

# Disability, Federalism, and a Court with an Eccentric Mission

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*This article examines the Supreme Court's recent Eleventh and Fourteenth Amendment decisions constraining Congress's power to impose legal obligations on state governments. The context for this examination is the Court's consideration this Term of the constitutionality of the provision of the Americans with Disabilities Act authorizing individual suits against states by persons alleging they have been victimized by state disability discrimination. This article was written while the fate of the ADA case was unknown. But the Court issued its decision just as this article was going to press. A postscript has been added describing that decision and its implications. The article concludes that the Court's recent decisions, including the decision just issued respecting the ADA, represent a dramatic redefinition of both the Eleventh and Fourteenth Amendments, and a consequent diminution of congressional power to prevent discrimination by states against historically disadvantaged groups in our society.*

## I. INTRODUCTION

### A. *The Consensus that Supported the Enactment of the ADA*

There are occasions in the public life of the nation when the evidence of pervasive public and private oppression of a group of citizens is so plain and so compelling that a consensus emerges for a national response in the form of a comprehensive federal legislative remedy—a consensus that knows no partisan political conflict, no ideological disagreement, and no federal/state divide. The enactment of the Americans with Disabilities Act (ADA) in 1990 was such an occasion.<sup>1</sup>

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<sup>1</sup> 42 U.S.C. §§ 12101–12213 (1994).

The ADA grew out of more than twenty years of hearings and investigations into the deplorable public- and private-sector treatment of persons with disabilities and their consequent deplorable situation.<sup>2</sup> Those hearings and investigations led to the introduction of a broadly-sponsored legislative response; two years of fine-tuning in committee and floor deliberations eventuating in a final bill that was the product of “[c]ompromise, carefully crafted and painstakingly wrought”;<sup>3</sup> and passage of the final bill by 91–6 in the United States Senate and 377–28 in the United States House of Representatives.<sup>4</sup>

As the legislation moved forward, it was championed by federal and state authorities alike. The Bush administration supported its passage, as did leaders of both parties in Congress,<sup>5</sup> the National Association of Attorneys General, the National Association of Counties, the National Association of State Mental Retardation Program Directors, and many private groups and associations.<sup>6</sup> The ADA marshalled this unity of action for the most compelling of reasons, as President Bush stated in signing the ADA into law:

[T]ragically, for too many Americans, the blessings of liberty have been limited or even denied. The Civil Rights Act of ‘64 took a bold step towards righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today’s legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.<sup>7</sup>

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<sup>2</sup> With respect to the ADA alone, Congress held eighteen hearings and sixty-three field hearings, considered innumerable studies and reports evaluating the discriminatory treatment of persons with disabilities and the reasons therefor, issued five committee reports, and engaged in prolonged floor debate. Timothy Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMPLE L. REV. 393, 393, 414 (1991). The ADA deliberations, moreover, rested on the institutional knowledge and expertise Congress had gained in considering and enacting prior statutes addressing discrimination on the basis of disability. Lowell P. Weiker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMPLE L. REV. 387, 387–89 (1991).

<sup>3</sup> 135 CONG. REC. 19,800 (1989) (statement of Sen. Harkin). *See also* 135 CONG. REC. 19,804 (1989) (statement of Sen. Hatch) (discussing the compromise that resulted in the ADA).

<sup>4</sup> 136 CONG. REC. 17,375–76 (1990) (showing Senate approval of the Conference Committee Report); 136 CONG. REC. 17,296–97 (1990) (showing House approval of the Conference Committee Report).

<sup>5</sup> *See* 135 CONG. REC. 19,804 (1989) (statement of Sen. Hatch); 135 CONG. REC. 19,806–07 (1989) (statement of Sen. Kennedy); 135 CONG. REC. 19,889 (1989) (statement of Sen. Dole); 135 CONG. REC. 19,798 (1989) (statement of Sen. Harkin).

<sup>6</sup> 135 CONG. REC. 19,799 (1989). In addition, the fifty Governors’ Committees advised Congress that state laws were inadequate to deal with the problem. *See infra* note 297 and accompanying text. There was no opposition to the bill from the states.

<sup>7</sup> *Remarks by the President During the Ceremony for the Signing of the Americans with*

While the ADA applies to much more than employment, this article focuses on the provisions of the ADA banning employment discrimination. Title I of the ADA forbids disability-based discrimination in employment. In addition to actions motivated by negative animus, "discrimination" is defined to include a number of practices without regard to motivation, including the failure to make reasonable accommodation (if it can be provided without undue hardship) to the known physical and mental limitations of an otherwise qualified employee.<sup>8</sup> Title I applies to both private employers and state and local government employers.<sup>9</sup>

Title II of the ADA applies only to state and local governments.<sup>10</sup> It forbids discrimination with respect to programs, services, and activities, and thus ranges far beyond employment.<sup>11</sup> There is a circuit conflict as to whether Title II applies to employment.<sup>12</sup> The Eleventh Circuit, which decided the case now before the Supreme Court, has held that it does.<sup>13</sup> This position is also held by the Attorney General, who is charged with administering Title II.<sup>14</sup> If that is correct, Titles I and II overlap, to the extent that they both forbid employment discrimination by public employers. The Attorney General has issued a regulation declaring that, insofar as the titles overlap (i.e., with respect to public employment), Title II's substantive provisions are to be interpreted in the same way as Title I's substantive provisions.<sup>15</sup> This does not render Title II superfluous, for it provides somewhat more generous remedies to a victim of discrimination than are available under Title I.<sup>16</sup>

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*Disabilities Act of 1990*, in THE LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT 845 (G. John Tysse ed., 1991).

<sup>8</sup> 42 U.S.C. § 12112(a) (1994) (prohibiting discrimination); § 12112(b) (giving several different definitions of "discriminate").

<sup>9</sup> 42 U.S.C. § 12111(5) (1994) (defining "employer").

<sup>10</sup> § 12131(1).

<sup>11</sup> § 12132 (prohibiting discrimination by any "public entity").

<sup>12</sup> Compare *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 820 (11th Cir.) (holding that Title II does apply to employment), with *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999) (holding that Title II does not apply to employment).

<sup>13</sup> *Univ. of Ala. Bd. of Trs. v. Garrett*, 193 F.3d 1214, 1216 (11th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3654 (U.S. April 17, 2000) (No. 99-1240), *rev'd*, No. 99-1240, 2001 U.S. LEXIS 1700 (U.S. Feb. 21, 2000).

<sup>14</sup> Nondiscrimination on the Basis of Disability in State and Local Government Service, 28 C.F.R. § 35.140 (1999). See also Section-by-Section Analysis, 28 C.F.R. § 35.140 app. A, at 491 (1999) (stating that Title II "applies to all activities of public entities, including their employment practices").

<sup>15</sup> 28 C.F.R. § 35.140 (1999). See also 28 C.F.R. § 35.140 app. A, at 491 (1999).

<sup>16</sup> Title I declares that it is to be enforced pursuant to the remedial scheme applicable to Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (1994). This means that compensatory damages and punitive damages are capped at a combined total of \$50,000 to \$300,000, depending on the size of the employer. 42 U.S.C. § 1981a(b)(3) (1994). Title II is enforced pursuant to the

### B. *The Present Peril of a Part of the ADA*

Despite the unanimity of support, the fate of a part of the ADA is now in immediate peril. The Supreme Court will decide this Term, in *University of Alabama Board of Trustees v. Garrett*,<sup>17</sup> whether Congress exceeded its constitutional powers by authorizing individuals to sue states alleging that the latter have violated the ADA. This current jeopardy does not reflect a collapse of support for the ADA in the decade since its passage. Quite the contrary, the major players in the enactment of the ADA all have filed amicus curiae briefs with the Court in *Garrett* urging that the challenged provision be upheld. Former President Bush filed one such brief, and the managers of the ADA in Congress (Senators Hatch, Dole, Kennedy and Harkin, and Representatives Bartlett and Hoyer) filed another. Indeed, of the twenty-one states registering their views in amicus curiae briefs, two-thirds ask the Court to uphold the provision subjecting them to suits by complaining individuals.<sup>18</sup>

The peril comes not from a loss of public support for the ADA, but from the territory staked out in recent decisions by a bare five-person majority of the current Supreme Court, which has pursued an eccentric mission of attempting to reinvigorate state "sovereignty" that appears to have no constituency in contemporary society. There is reason to doubt that the consensus in the outside world supporting the challenged ADA provision will have much influence on these Justices. Just a few months ago, these five Justices struck down a part of the Violence Against Women Act (VAWA)<sup>19</sup> despite a similar consensus in Congress and a line-up of states in amicus briefs 35–1 in favor of upholding the challenged provision.<sup>20</sup>

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remedial scheme of Title VI of the Civil Rights Act of 1964 under which there is no cap on the amount of compensatory or punitive damages. 42 U.S.C. § 12133 (1994); *Olmstead v. L.C.*, 527 U.S. 581, 590 n.4 (1999).

<sup>17</sup> 193 F.3d 1214, 1215 (11th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3654 (U.S. Apr. 17, 2000) (No. 99-1240). The Supreme Court decided *Garrett* on Feb. 21, 2000; its decision is described in a postscript to the article, *infra* accompanying text at notes 387–98.

<sup>18</sup> The Attorney General of Hawaii prepared an amicus curiae brief supporting Alabama's quest to strike down the individual-suit provision of the ADA. A draft of that brief was circulated to the Attorneys General of all the states with invitations to join. Only six other states accepted the invitation: Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee. The Attorney General of Minnesota thereupon prepared an amicus curiae brief supporting the respondents' quest to *uphold* the individual-suit provision, which was joined by thirteen other states: Arizona, Connecticut, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, New Mexico, New York, North Dakota, Vermont, and Washington. Twenty-eight states joined neither brief, suggesting implicitly that they are content with (even if not ecstatic about) the ADA's provision. Otherwise, their economic self-interest should have prompted their joining Hawaii's brief.

<sup>19</sup> *United States v. Morrison*, 120 S. Ct. 1740 (2000) (to be published at 529 U.S. 598 (2000)) (striking down part of the Violence Against Women Act, 42 U.S.C. § 13981 (1994)).

<sup>20</sup> See *Morrison*, 120 S. Ct. at 1743 (Souter, J., dissenting).

Here is the root of the problem: Congress, in enacting the ADA, claimed that it was exercising its powers under both the Commerce Clause<sup>21</sup> and Section 5 of the Fourteenth Amendment.<sup>22</sup> At the time the ADA was enacted, the governing law—stated in *Pennsylvania v. Union Gas Co.*,<sup>23</sup>—was that Congress, when exercising its Article I legislative powers, may authorize private-party suits against states to enforce the federal law. But the Supreme Court has since overruled *Union Gas*, five Justices holding, in *Seminole Tribe v. Florida*,<sup>24</sup> that Congress is precluded by the Eleventh Amendment from authorizing private-party suits against states, except when exercising its power, conferred in Section 5 of the Fourteenth Amendment, to “enforce, by appropriate legislation,” that Amendment’s substantive provisions.<sup>25</sup> As long as this majority holds sway, it is not enough that Congress has power under the Commerce Clause to enact a statute regulating the states: that will not support the creation of a private right of action to enforce the statute.<sup>26</sup> Thus, the fate of the ADA (as of every federal statute that purports to authorize private suits against states) turns on whether the statute is a proper exercise of Congress’s power to enforce the Fourteenth Amendment—the one fount of congressional power that the Court’s current majority acknowledges entitles Congress to authorize private suits.

Here is the rub: this same five-person majority has an appetite for rejecting Congress’s invocations of its Fourteenth Amendment power. In the past three years, the Court has addressed the Fourteenth Amendment provenance of four federal statutes and found each wanting. The Court has invalidated the entire Religious Freedom Restoration Act (RFRA),<sup>27</sup> the provision of the Violence Against Women Act creating a federal cause of action by which victims of gender violence can recover damages from the perpetrators,<sup>28</sup> and the authorization of private-party suits against

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<sup>21</sup> U.S. CONST. art. I, § 8, cl. 2.

<sup>22</sup> *Id.* at amend. XIV, § 5.

<sup>23</sup> 491 U.S. 1 (1989).

<sup>24</sup> 517 U.S. 44 (1996).

<sup>25</sup> U.S. CONST. amend. XIV, § 5.

<sup>26</sup> Four members of the Court have stated that they do not accept, for *stare decisis* purposes, the holding in *Seminole Tribe* in judging the constitutionality of statutory provisions providing for the enforcement of valid federal law through private-party suits against the States. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 650–54 (2000) (Stevens, J., dissenting) (to be published at 528 U.S. 62 (2000)). There is some possibility that new appointments to the Supreme Court would lead to the overturning of *Seminole Tribe*. Two of those in the current four-person minority were Republican appointees—Justice Stevens appointed by President Ford, Justice Souter by President George H.W. Bush. Adherence to *Seminole Tribe* is unlikely to be a litmus test for future appointments, even in a Republican administration.

<sup>27</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb–2000bb-4 (1994), because Congress claimed power to enact RFRA only under the Fourteenth Amendment).

<sup>28</sup> *United States v. Morrison*, 120 S. Ct. 1740 (2000) (to be published at 529 U.S. 598 (2000)).

states under the Patent Remedy Act<sup>29</sup> and the Age Discrimination in Employment Act (ADEA).<sup>30</sup>

The courts of appeals are sharply divided on whether a similar fate awaits the ADA.<sup>31</sup> Not surprisingly, given the circuit conflict and its own sense of mission, the Supreme Court has been anxious to address the ADA's Fourteenth Amendment pedigree. Within days after the private-suit provision of the Age Discrimination Employment Act was struck down, the Court granted certiorari to decide the validity

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(striking down a provision of the Violence Against Women Act, 42 U.S.C. § 13981 (1994), because the Court found the statute wanting under both the Commerce Clause and the Fourteenth Amendment).

<sup>29</sup> Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (invalidating the authorization of private-party suits against states under the Patent Remedy Act, 35 U.S.C. §§ 279(h), 296(a) (1994)).

<sup>30</sup> Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631 (2000) (to be published at 528 U.S. 62) (invalidating the authorization of private-party suits against states in the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994 and Supp. IV 1998)).

<sup>31</sup> Five circuits have upheld the ADA's provision of private suits against the states—First Circuit: *Torres v. P.R. Tourism Co.*, 175 F.3d 1, 6 n.7 (1st Cir. 1999) (dictum); Second Circuit: *Kilcullen v. N.Y. State Dep't of Labor*, 205 F.3d 77, 82 & n.7 (2d Cir. 2000) (following *Muller* after *Kimel* and collecting cases); *Muller v. Costello*, 187 F.3d 298, 309–10 (2d Cir. 1999); Ninth Circuit: *Becker v. Armenakis*, No. 99-35296, 2000 U.S. App. LEXIS 12847, at \*2 (9th Cir. June 8, 2000) (reaffirming *Dare* after *Kimel*); *Dare v. California*, 191 F.3d 1167, 1175–76 (9th Cir. 1999); Tenth Circuit: *Cisneros v. Wilson*, 226 F.3d 1113, 1124–28 (10th Cir. 2000); Eleventh Circuit: *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214, 1218 (11th Cir. 1999) (applying the 11th Circuit's *Kimel* decision); *Kimel v. Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998), *aff'd on other grounds*, 528 U.S. 62 (2000).

Four circuits have ruled the provision invalid—Third Circuit: *Lavia v. Pennsylvania*, 224 F.3d 190, 206 (3d Cir. 2000); Sixth Circuit: *Popovich v. Cuyahoga County Ct. Com. Pl.*, 227 F.3d 627, 641–42 (6th Cir. 2000) (to be published at 227 F.3d 627 (2000)); Seventh Circuit: *Walker v. Snyder*, 213 F.3d 344, 346–47 (7th Cir. 2000); *Stevens v. Ill. Dep't of Transp.*, 210 F.3d 732, 740–41 (7th Cir. 2000); *Erickson v. Bd. of Governors of State Colls. & Univs. for N.E. Ill. Univ.*, 207 F.3d 945, 952 (7th Cir. 2000); Eighth Circuit: *Fisher v. Comm'n of Veterans Affairs*, No. 99-3750, 2000 U.S. App. LEXIS 22880, at \*1–2 (8th Cir. Sept. 11, 2000) (per curiam) (affirming *Debose* after *Kimel*); *Debose v. Nebraska*, 207 F.3d 1020, 1021 (8th Cir. 1999); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc).

Both the Fourth and the Fifth Circuits are apparently divided. *Compare* *Amos v. Md. Dep't of Pub. Safety & Corr. Servs.*, 178 F.3d 212, 222–23 (4th Cir. 1999) (finding Title II a constitutionally valid abrogation of Eleventh Amendment immunity as applied to state prisoners), *vacated and appeal dismissed*, 205 F.3d 687, 688 (4th Cir. 2000) and *Coolbaugh v. Louisiana*, 136 F.3d 430, 438 (5th Cir. 1998) (finding Title II a valid abrogation), *with* *Neinast v. Texas*, 217 F.3d 275, 280 n.29, 282 (5th Cir. 2000) (questioning *Coolbaugh* in light of *Kimel* and finding 28 C.F.R. § 35.130(f) (1999), promulgated under Title II, an unconstitutional abrogation) and *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698, 707 (4th Cir. 1999) (holding that 28 C.F.R. § 35.130(f) (1999), promulgated under Title II, is an unconstitutional abrogation).

of the comparable provisions of the ADA;<sup>32</sup> when both of those cases settled, the Court granted certiorari in *Garrett*.<sup>33</sup>

### C. University of Alabama-Birmingham Board of Trustees v. Garrett

*Garrett* is in fact two separate lawsuits that were consolidated as they traveled up the judicial ladder. They have in common that the two plaintiffs engaged the same law firm in Birmingham, Alabama, to represent them. The Attorney General of Alabama represents both of the state agency defendants, and the suits were filed in the same district court and assigned to the same judge.

The plaintiff in one case is Patricia Garrett, a seventeen-year employee of the University of Alabama-Birmingham who had risen to the position of director of nursing in one unit of the university's hospital. Garrett contends that she was forced out of her job because she contracted breast cancer, notwithstanding that she continued to perform successfully the essential functions of her job.<sup>34</sup>

The other case involves Milton Ash, a Youth Services security officer in the Alabama Department of Youth Services (ADYS). Ash suffers from diabetes, severe chronic asthma, and other respiratory disabilities; he is vulnerable to asthma attacks so severe as to require hospitalization. Throughout his tenure with ADYS, Ash requested two accommodations urged by his doctor, but which ADYS refused to provide. First, he asked that ADYS enforce its promulgated "no-smoking" rule in the Gatehouse—a small workspace where he often is confined with fellow workers who smoke. Second, he asked ADYS to repair vehicles he was required to drive on the job, as they leaked carbon monoxide into the passenger compartment. Ultimately,

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<sup>32</sup> See *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (to be published at 528 U.S. 1146 (1999)), *cert. granted sub. nom.* *Alsbrook v. Arkansas*, 120 S. Ct. 1003 (2000) (to be published at 529 U.S. 1001 (2000)), *cert. dismissed*, 120 S. Ct. 1265 (2000); *Kimel v. Fla. Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1999), *cert. granted sub. nom.* *Fla. Dep't of Corr. v. Dickson*, 139 F.3d 1426 (11th Cir. 1998), *cert. dismissed*, 120 S. Ct. 1236 (2000).

<sup>33</sup> See *supra* note 17 and accompanying text.

<sup>34</sup> According to Garrett's complaint, an affidavit she filed before the suit was dismissed, and deposition testimony elicited from her by the state, upon discovery of her cancer, Garrett had a lumpectomy and node removal and continued working for several months during radiation and the start of chemotherapy, then taking leave until the completion of her chemotherapy. Her complaint alleges that her immediate supervisor, the associate executive director of the hospital, repeatedly threatened, prior to Garrett's taking leave, to transfer her to a less demanding position because of her cancer. When Garrett completed her chemotherapy, and was ready to return from her leave, the associate executive director discouraged Garrett's return. Within a week after Garrett's return, the associate executive director forced her out of the position and into a much lower paying job, despite Garrett's ability to perform the essential functions of the director of nursing position. Amended Complaint at ¶¶ 3, 5–14, *Garrett v. Univ. of Ala. Bd. of Trs.*, 989 F. Supp. 1409 (N.D. Ala. 1998) (No. CV-97-AR-0092-2); Affidavit of Patricia Garrett at ¶¶ 2–1; Deposition Testimony of Patricia Garrett at pages 154–60, 199–205, 266–70, 275–79, and 356–57.

Ash filed an EEOC charge challenging the refusal of these accommodations. While it was pending, Ash was diagnosed with sleep apnea, and at his doctor's urging, Ash sought a transfer from his rotating shift to a steady day shift. This, too, was refused, although other employees, junior to Ash, were transferred to vacancies arising on the day shift.<sup>35</sup>

In their complaints, Garrett and Ash alleged violations of both Titles I and II of the ADA.<sup>36</sup> Garrett's principal claim is disparate treatment: she was removed from her job because of her supervisor's antipathy to having a person with a history of breast cancer in that job. Ash's principal claim is failure to provide the reasonable accommodations he requested.<sup>37</sup>

The defendants in both cases moved for summary judgment on Eleventh Amendment grounds, i.e., that Congress had no power to authorize private suits against the state.<sup>38</sup> The district court agreed and dismissed the complaints.<sup>39</sup> The cases were consolidated on appeal to the Eleventh Circuit, and the United States intervened to defend the constitutionality of the private-suit provision. The Eleventh Circuit, in accordance with its earlier precedent, upheld the constitutionality of the private-suit provision and reversed the district court's dismissal of the suits.<sup>40</sup> At the request of the state agencies, the Supreme Court granted certiorari to review this ruling.<sup>41</sup>

#### D. *Outline of This Article*

The centerpiece of this article, Part III—completed while a decision in *Garrett* is awaited following oral argument—is an examination of the constitutional question

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<sup>35</sup> Complaint at ¶¶ 3–14, *Ash v. Ala. Dep't of Youth Services*, 989 F. Supp. 1409 (N.D. Ala. 1998) (No. CV-97-AR-2179-S); Affidavit of Milton Ash at ¶¶ 2–24.

<sup>36</sup> Amended Complaint at ¶¶ 14–20, *Garrett*; Complaint at ¶¶ 15–22, *Ash*. Both also allege violations of the Rehabilitation Act of 1973, 29 U.S.C. § 706 (1994). Amended Complaint at ¶¶ 14–20, *Garrett* (No. 99-1240); Complaint at ¶¶ 15–22, *Ash*.

<sup>37</sup> Amended Complaint at ¶¶ 14–20, *Garrett*. Garrett also claims that, upon her removal, she was denied the reasonable accommodation of appointment to another position of comparable stature and salary. Ash also claims that he was retaliated against for invoking his rights under the ADA. Complaint at ¶¶ 14–20, *Ash*.

<sup>38</sup> Motion by the UAB Bd. of Trs. for Partial Summary Judgment, *Univ. of Ala. Bd. of Trs. v. Garrett*, No. 99-1240 (filed Oct. 7, 1997 and amended Dec. 9, 1997). The motion was treated as a motion for complete summary judgment by the District Court in its decision. *Garrett v. Univ. of Ala. Bd. of Trs.*, 989 F. Supp. 1409 (N.D. Ala. 1998). See also Motion by Ala. Dep't of Youth Servs. for Summary Judgment, *Ash* (No. CV-97-AR-2179-S) (filed Dec. 2, 1997).

<sup>39</sup> *Garrett*, 989 F. Supp. 1409.

<sup>40</sup> *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214 (11th Cir. 1999), cert. granted, 120 S. Ct. 1669 (2000).

<sup>41</sup> *Univ. of Ala. Bd. of Trs. v. Garrett*, 120 S. Ct. 1669 (2000).



the Court will address in *Garrett*. As *Garrett* may have been decided by the time this article is published, and in any event will be decided shortly thereafter, an article with this limited focus would be destined for an exceptionally short “shelf-life,” except, perhaps, as an artifact reflecting the strategic choices made by one of the parties litigating before the Supreme Court. So that this article may serve a more enduring purpose, I have surrounded the discussion of *Garrett* with materials that may be of value regardless of its disposition. Part II discusses “how we got here,” by tracing the evolution of the Supreme Court’s treatment of the Eleventh Amendment and of Congress’s power to enforce the Fourteenth Amendment. As will be shown, the current Court has changed the course of decisional law on both of these issues. After Part III’s discussion of the issues in *Garrett*, Part IV explores what will be left of Congress’s efforts to forbid disability discrimination by states if the Court holds private suits barred by the Eleventh Amendment. The issues discussed in Part IV will remain important even if the Court upholds the ADA’s private-suit provision. For those issues will arise with respect to any statute found wanting under the Eleventh Amendment—a fate that has already befallen the Patent Remedy Act and the Age Discrimination in Employment Act.

## II. HOW WE GOT HERE: A BRIEF HISTORY OF THE COURT’S EVOLVING CONCEPTIONS OF THE ELEVENTH AMENDMENT AND OF CONGRESS’S POWER UNDER THE FOURTEENTH AMENDMENT

This Part traces the evolution of the Supreme Court’s interpretation of the Eleventh Amendment, and of the Court’s conception of Congress’s power to enforce the Fourteenth Amendment. These are the necessary backdrops to understanding the issue posed in *Garrett*.

### A. *The Eleventh Amendment*

The Eleventh Amendment was adopted in 1798, in reaction to the Supreme Court’s decision in *Chisholm v. Georgia*.<sup>42</sup> The Court held in *Chisholm* that a South Carolina citizen could sue the State of Georgia in federal court, invoking diversity of citizenship jurisdiction, to enforce his *state-law* entitlement to payment by Georgia on bonds it had issued during the Revolutionary War.<sup>43</sup> Georgia would not have been susceptible to suit in state courts, as it enjoyed sovereign immunity there.<sup>44</sup>

The effect of the *Chisholm* holding was that the diversity jurisdiction of the federal courts subjected states to legal liability for breaching state-grounded

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<sup>42</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>43</sup> *Id.*

<sup>44</sup> See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1469–70 (1987).

substantive obligations that otherwise would have been unenforceable. The states were not amused, as many of them were obligated on war bonds they could not comfortably pay, and had been counting on their immunity from suit in state court to escape payment.<sup>45</sup> At the states' insistence, the Eleventh Amendment was promulgated by Congress and swiftly ratified by the states.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>46</sup>

Historians and legal scholars have concluded, virtually unanimously, from the language, context, and "legislative history" of the Eleventh Amendment, that the Amendment was not intended to insulate states from federal court suits to enforce federal obligations.<sup>47</sup> Rather, its purpose was to remove federal jurisdiction over *state*

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<sup>45</sup> See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1058 n.114 (1983); John V. Orth, *The Truth about Justice Iredell's Dissent in Chisholm v. Georgia (1793)*, 73 N.C. L. REV. 255, 268 n.61 (1994) (citing John V. Orth, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 34-42 (1987)).

<sup>46</sup> U.S. CONST. amend. XI.

<sup>47</sup> In addition to the articles cited in Justice Souter's dissent in *Seminole Tribe*, 517 U.S. 44, 110 n.8 (1996), the following articles reject the Eleventh Amendment's application to federal question suits: Amar, *supra* note 44, at 1474-92; Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203 (1978); Fletcher, *supra* note 45, at 1034; William Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1263 (1989); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893 (1983); Stephen Harris Jr. and Michael Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action over Which the Federal Courts Have Exclusive Jurisdiction*, 37 EMORY L.J. 645, 703-04 (1988); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 1000 (2000); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1351 (1998); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 68 (1984); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260, 1260-61 (1990); Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 868-69 (2000); Keith Werhan, *Pullman Abstention after Pennhurst: A Comment on Judicial Federalism*, 27 WM. AND MARY L. REV. 449, 460 n.46 (1986).

There are three articles expressing "minority" views cited in Justice Souter's famous footnote eight in *Seminole Tribe v. Florida*, 517 U.S. 44, 110 n.8 (1996) (Souter, J., dissenting), but two of these concede that *intra-state* federal question suits, i.e., those between a citizen of a state and that state, can be heard in federal court. See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1367-71 (1989); Calvin R. Massey, *State*

law claims (from which states were immune in their own courts) and which were cognizable in federal court only because of the parties' diverse citizenship.<sup>48</sup> Justice Iredell, the lone dissenter in *Chisholm*, had conceded that the states, by ratifying the Constitution, had surrendered their sovereignty with respect to powers that the document conferred on the federal government, and accordingly the Supremacy Clause meant that Congress could confer federal court jurisdiction to entertain suits to enforce *federal* law against states.<sup>49</sup> Justice Iredell's complaint was that there was no warrant for federal jurisdiction to subject states to *state law* obligations to which they had not consented.<sup>50</sup> The Eleventh Amendment was widely understood to have incorporated the line drawn by Justice Iredell.<sup>51</sup>

Chief Justice Marshall, writing for the Court in 1823 in *Cohens v. Virginia*,<sup>52</sup> ratified that understanding of the limited sweep of the Eleventh Amendment declaring that the Amendment had no effect on federal question suits and that "a case arising under the Constitution or laws of the United States is cogni[z]able in the Courts of the Union, whoever may be the parties to that case."<sup>53</sup> The point of the Eleventh Amendment, he explained, was to bar jurisdiction in suits at common law by Revolutionary War debt creditors, not to "strip the [federal] government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation."<sup>54</sup>

Still, the Amendment's infelicitous wording left room for future mischief. By its terms, the Amendment banned federal jurisdiction over *all* suits against states by out-of-staters, but over *no* suits against states by in-staters. That surely was not what the

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*Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHL L. REV. 61, 66 (1989). Only the third "minority" article cited in Justice Souter's footnote supports the holding in *Seminole Tribe*. See William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1382–83 (1989).

<sup>48</sup> See Fletcher, *supra* note 45, at 1035, 1060 ("In *Chisholm*, the Court held that this state-citizen diversity clause conferred jurisdiction to hear *Chisholm's* damage action against Georgia and that the clause abrogated any sovereign immunity defense to the suit that Georgia might otherwise have had. The Eleventh Amendment was passed immediately thereafter in order to overturn this result. . . . The narrowness of the Amendment's coverage and its congruence with the affirmative authorization in Article III of state-citizen diversity jurisdiction suggest strongly that rather than intending to create a general sovereign immunity protection from all suits by private citizens, as the first proposal would have done, the drafters of the second and third proposals intended only to limit the scope of that part of Article III's jurisdictional grant—the state-citizen diversity clause—that had led to *Chisholm*.").

<sup>49</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435–36 (1793).

<sup>50</sup> *Id.* at 448–49.

<sup>51</sup> See *supra* note 47 and accompanying text.

<sup>52</sup> 19 U.S. (6 Wheat.) 264 (1823).

<sup>53</sup> *Id.* at 383.

<sup>54</sup> *Id.* at 407.

drafters intended, for it would have left in-staters free to invoke federal *subject matter* jurisdiction to enforce federal law against a state while denying that right to out-of-staters—a distinction that would not make sense. Sloppy drafting thus precluded a literal interpretation of the Amendment. Yet the wording of the Amendment, sloppy though it be, suggests that the real target of the Amendment was state law claims. If the drafters had intended to insulate states from all private suits, no matter whether based on federal or state law, they would surely have adopted the alternative version of the Amendment introduced by Representative Theodore Sedgwick:

[N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.<sup>55</sup>

That the drafters instead chose a version of the Amendment that closed the federal courts only to citizens of other states and foreigners suggests that their eye was on the diversity clause—a clause that would extend federal jurisdiction only to suits by those people—and not on the (federal) subject matter clause, which could be invoked by anyone.<sup>56</sup>

After Chief Justice Marshall's pronouncement, the Court waited seventy-seven years before revisiting the meaning of the Eleventh Amendment. But when it finally did, in 1890, in *Hans v. Louisiana*,<sup>57</sup> it sang a new tune. *Hans* was an unfortunate test case of the meaning of the Amendment. Like *Chisholm*, it was a suit to enforce obligations on a state war bond, this time issued during the Civil War. But unlike *Chisholm*, the claim was now cast as a federal law claim—plaintiffs claimed that in reneging on its bonds Louisiana was violating the federal Constitution's command that states not impair the obligations of contracts.<sup>58</sup> Plaintiffs invoked the *subject matter* jurisdiction of the federal courts to advance this *federal* claim.<sup>59</sup> The *Hans* Court, with its eye on the underlying problem that led to the adoption of the Eleventh Amendment, was not about to permit legal creativity—the refashioning of the debt claim as federal rather than state—to undo the protection against state war debts that had animated the Amendment's adoption. Hence, the Court ruled that the Eleventh

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<sup>55</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 111 (1996) (Souter, J., dissenting) (quoting GAZETTE OF THE UNITED STATES, Feb. 20, 1973, at 303) (alteration in original).

<sup>56</sup> Indeed, to jump ahead of the story, even the current majority on the Court has acknowledged that “the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts.” *Seminole Tribe*, 517 U.S. at 54. As will be shown, this has not deterred the Court from using the Amendment to restrict the federal question jurisdiction as well.

<sup>57</sup> 134 U.S. 1 (1890).

<sup>58</sup> *Id.* at 1–3.

<sup>59</sup> *Id.* at 9–10.

Amendment must apply to federal causes of action, just as it does to state law actions.<sup>60</sup> Chief Justice Marshall's perorations to the contrary were acknowledged, but dismissed as a rare off-day for that great man.<sup>61</sup>

After *Hans*, the Eleventh Amendment lay dormant again, for another eighty-six years, until Title VII of the Civil Rights Act of 1964, as amended in 1972, was challenged for authorizing private suits against states that engage in employment discrimination based on race, religion, national origin, or sex. In *Fitzpatrick v. Bitzer*,<sup>62</sup> the Court sidestepped the broader issue by holding that, whatever the Eleventh Amendment's significance for legislation enacted pursuant to provisions of the Constitution that pre-dated its adoption, the Eleventh Amendment did not apply to statutes enacted to implement the later-enacted Fourteenth Amendment. The Fourteenth Amendment imposed legal constraints directly on states and expressly authorized Congress to enforce the rights created therein, and this empowerment perforce overrode whatever constraints might exist in the Eleventh Amendment.<sup>63</sup> As the state in *Fitzpatrick* did not dispute that Title VII was a proper exercise of Congress's power to enforce the Fourteenth Amendment, the Eleventh Amendment was inapplicable.<sup>64</sup>

In 1987, the modern Court finally addressed the continued applicability of *Hans* to statutes which, unlike *Fitzpatrick*, were enacted pursuant to congressional powers conferred by provisions of the Constitution that pre-dated the Eleventh Amendment. A bare majority of the *Welch* Court,<sup>65</sup> conceding that the holding in *Hans* was questionable, decided nonetheless to accept that holding as *stare decisis*. The majority explained that whatever its correctness, *Hans*'s effects were not "pernicious" because there existed adequate alternative mechanisms (apart from individual suits against states) for enforcing federal law against states.<sup>66</sup> The other four Justices in *Welch* were prepared to reverse *Hans* outright.<sup>67</sup>

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<sup>60</sup> The Court overcame the peculiar wording of the Eleventh Amendment, which would not have barred federal law suits by in-staters, by observing that the Eleventh Amendment was intended to reinstate the original, "correct" meaning of Article III of the Constitution, which had been misconstrued in *Chisholm*. *Hans*, 134 U.S. at 11. Article III was never intended to permit suits of any type against states. This conception was reinstated by the Eleventh Amendment, and so Article III itself, if not the literal wording of the Eleventh Amendment, is now to be construed as barring federal jurisdiction over federal law suits against states by their own citizens. *See id.* In the modern cases described in the text, this roundabout formulation has been collapsed, as the Court has been talking about the Eleventh Amendment as the source of the ban on federal subject matter jurisdiction.

<sup>61</sup> *Hans*, 134 U.S. at 20.

<sup>62</sup> 427 U.S. 445 (1976).

<sup>63</sup> *Id.* at 456-57.

<sup>64</sup> *Id.* at 456 n.11.

<sup>65</sup> *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-79 (1987).

<sup>66</sup> *Id.* at 487-88. *See infra* Part IV for a discussion of these alternatives. They include, *inter*

Two years later, in *Union Gas*,<sup>68</sup> the pendulum swung again. The Court now held that Congress has the power, when enacting legislation under Article I of the Constitution, to “abrogate” the states’ Eleventh Amendment immunity by clearly stating such an intention. This turnabout resulted because one Justice, Byron White, found a loophole by which he could move from the no-federal-suit camp to the other camp without overruling *Hans*.<sup>69</sup> He joined with the four dissenters in *Welch* to declare that “Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States.”<sup>70</sup> The distinction wrought by *Union Gas* is this: the mere presence of a federal claim does not empower a plaintiff to invoke the federal courts’ subject matter jurisdiction to enforce that claim—the Eleventh Amendment stands in the way. But if Congress expressly declares that it intends to permit the suit against states despite the Eleventh Amendment, the protection afforded by that Amendment evaporates. In *Hans*, where the plaintiffs had invoked the “impairment of contracts” clause of the Constitution unaided by an express congressional abrogation of the Eleventh Amendment, the Amendment remained a bar. But when a federal statute confers rights and expressly authorizes private suits to enforce them notwithstanding the Eleventh Amendment, as had occurred in *Union Gas*, the Amendment is no longer operative.

This notion that one has a constitutional right, but that Congress can abrogate it, is unique in the Court’s jurisprudence. But it is a testament to how the unfortunate wording and history of the Eleventh Amendment—coupled with the desperate need to find a fifth vote to allow private suits against states—have tortured the Court’s jurisprudence. However convoluted the route, *Union Gas* meant that Congress could enact Commerce Clause legislation conferring rights against states and authorize private-party suits against states to enforce those rights. In a roundabout way, the Supreme Court’s decisional law had evolved to the point where, with a little help from Congress, the Eleventh Amendment would be confined to its originally-intended role of banning federal jurisdiction over *state law* claims against states.

Alas, this convergence with original purpose was short-lived. In 1996, just seven years after *Union Gas*, but after several changes in the Court’s composition, the balance had tilted back 5–4 in the other direction.<sup>71</sup> That bare majority expressly

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*alia*, the right of the federal government to sue states, and the right of individuals to sue state officials under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

<sup>67</sup> *Welch*, 483 U.S. at 519–21.

<sup>68</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

<sup>69</sup> *Id.* at 57.

<sup>70</sup> *Id.*

<sup>71</sup> Justices Brennan, Marshall, Blackmun, and White—four of the five-person majority in *Union Gas*—were no longer on the Court. They had been replaced, respectively, by Justices Souter, Thomas, Ginsburg, and Breyer. The critical change was the replacement of Justice Marshall by Justice Thomas. In all other instances, the new Justice shared the predecessor’s

overruled *Union Gas* in *Seminole Tribe*.<sup>72</sup> Acknowledging that the text of the Amendment appears limited to the federal courts' diversity jurisdiction,<sup>73</sup> the majority declared, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms."<sup>74</sup> That "presupposition," located in *Hans*, "has two parts: first, that each State is a sovereign entity in our federal system; and second, that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without his consent.'"<sup>75</sup> Neither the *Hans* Court in adopting this presupposition, nor the *Seminole Tribe* Court in embracing it, acknowledged that our Constitution has a Supremacy Clause.

The majority's holding in *Seminole Tribe* garnered stinging dissents from four Justices.<sup>76</sup> Indeed, these four are so contemptuous of the majority's holding in *Seminole Tribe* that they have refused to accept the holding as *stare decisis* and have declared their intention to dissent whenever the Court strikes down a federal statute on Eleventh Amendment grounds:

I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. . . . [B]y its own repeated overruling of earlier precedent, the majority has itself discounted the importance of *stare decisis* in this area of the law. The kind of judicial activism manifested in cases like *Seminole Tribe* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.<sup>77</sup>

The majority in *Seminole Tribe* did acknowledge, however, as the Court had previously held in *Fitzpatrick*, that the Eleventh Amendment does not apply to suits in which states seek to enforce statutes enacted pursuant to Congress's powers under the Fourteenth and Fifteenth Amendments (Civil War Amendments).<sup>78</sup>

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support for the holding in *Union Gas*.

<sup>72</sup> 517 U.S. 44, 66 (1996).

<sup>73</sup> See *supra* note 56.

<sup>74</sup> *Seminole Tribe*, 517 U.S. at 54 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). This, it bears emphasis, is from the "strict construction" wing of the Court.

<sup>75</sup> *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 3 (1890) (emphasis deleted)).

<sup>76</sup> *Id.* at 76–100 (Stevens, J., dissenting); *id.* at 100–85 (Souter, J., dissenting, joined by Ginsburg & Breyer, JJ.).

<sup>77</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 65–66 (2000) (Stevens, J., dissenting, joined by Souter, Ginsburg, & Breyer, JJ.) (citations and footnotes omitted).

<sup>78</sup> *Seminole Tribe*, 517 U.S. at 59. Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both confer enforcement power on Congress. They are referred to collectively in this paper, as they are repeatedly in the Court's decisions, as the "Civil War Amendments."

As a result of *Seminole Tribe*, Congress's invocation of its Commerce Clause power to enact the ADA, even if proper, is not sufficient to sustain the authorization of private suits against states. But the Fourteenth Amendment exception to *Seminole Tribe* would sustain that authorization if the ADA is a proper exercise of Congress's power to enforce the Fourteenth Amendment. That is the question the Court will decide in *Garrett*, and it requires that we shift our focus from the Eleventh Amendment to the Fourteenth.

### B. *Evolution of the Fourteenth Amendment*

What is required for a statute to be a proper exercise of Congress's power to "enforce" the Fourteenth Amendment? It seems self-evident that Congress could enact a statute authorizing federal court suits by individuals against states seeking equitable and legal relief for state violations of the Fourteenth Amendment. Such a statute, which would not purport to add to the substantive content of the Fourteenth Amendment, would be the quintessential embodiment of Congress's constitutional power to enact "appropriate" legislation to "enforce" the Fourteenth Amendment. Surprisingly, Congress has never enacted such a statute. It has, to be sure, enacted a statute that authorizes suits against "persons" who, under color of state law, deprive individuals of their constitutional rights,<sup>79</sup> but the Supreme Court interpreted the word "person" in § 1983 not to include the states.<sup>80</sup>

If the ADA merely forbade discrimination by states against individuals with disabilities "when such discrimination violates the Fourteenth Amendment," its congruity with the Section 5 power would be obvious. But, of course, the ADA does much more. It forbids a wide swathe of conduct by the states—e.g., the failure to make reasonable accommodations—that likely does not violate the constitution *unless invidiously motivated*.<sup>81</sup> Furthermore, the ADA forbids that conduct *whether or not*

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<sup>79</sup> See Civil Action for the Deprivation of Rights, 42 U.S.C. § 1983 (1994).

<sup>80</sup> *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). The Supreme Court has repeatedly held that cities, counties, school boards, and other local governmental entities do not enjoy the states' Eleventh Amendment immunity, even though their actions are "state action" within the meaning of the Fourteenth Amendment. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281 (1977). Thus, the private-suit authorization in the ADA is not in jeopardy as to these potential defendants, so long as the ADA is a proper exercise of either Congress's Commerce power or its Fourteenth Amendment power.

<sup>81</sup> I say "likely does not," rather than "does not," because there is some lingering uncertainty as to what level of scrutiny the Court will apply to disability discrimination. See *infra* notes 236–39 and accompanying text. If distinctions that disadvantage persons with disabilities were subjected to heightened scrutiny, they might violate the Equal Protection Clause even if innocently motivated. But if such distinctions are subject only to rational basis review, as the Court appeared to hold in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), then motivation—innocent or invidious—would be dispositive of whether most distinctions offend equal protection.



it is invidiously motivated. Thus, the ADA forbids even *innocently motivated* refusals of reasonable accommodation—i.e., those that are honestly motivated by a desire not to incur the burden of the accommodation, rather than by a desire to avoid having to employ a person with a disability. The crucial question, therefore, is whether the ADA's overbreadth exceeds the power conferred upon Congress by the Fourteenth Amendment because it forbids more than the Amendment forbids.

There is no question that some overbreadth is allowed Congress, when it finds a serious pattern of unconstitutional behavior, both to remedy prior violations of the Fourteenth and Fifteenth Amendments and to prevent future violations.<sup>82</sup> That was established in a quartet of decisions issued between 1966 and 1980 upholding provisions of the Voting Rights Act, and has been acknowledged again in a quartet of decisions in the past four years.<sup>83</sup> But, what predicate of unconstitutional behavior (or threat of such behavior) must exist for Congress to resort to overbreadth, and how much overbreadth is allowed in addressing that predicate? Answering these questions will determine the fate of the ADA provision challenged in *Garrett*.

To predict those answers, it is necessary to explore in depth the two quartets of decisions, issued in two discrete time periods, in which the Court has mapped the breadth of Congress's enforcement power under Section 5 of the Fourteenth Amendment. The first quartet spans the period 1966 to 1980—a time when "Warren Court" Justices still held the majority on the Court. The second quartet spans the years 1997 to 2000 and is the product of the current Court whose membership has remained constant throughout this period.

### 1. *Quartet #1: The Foundational Decisions Articulating Congress's Enforcement Powers*

While I will describe the quartets in chronological order, some advance warning of where the stress-lines between the first and second quartets lie may be helpful. The first quartet should be read with particular attention to three features of the decisions. First, how deferential is the Court to Congress's finding that there are constitutional violations of such magnitude as to warrant heroic legislative solutions? Second, how deferential is the Court to Congress's judgment as to what legislative steps are necessary to secure the protections of those Amendments? In this regard, note particularly the Court's receptivity to Congress's choice to adopt nationwide provisions. Finally, what "standard of review" does the Court adopt in judging the propriety of Congress's action? Is Congress's choice to be upheld so long as it is a

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<sup>82</sup> In the discussion that follows, some cases involve Congress's power under Section 5 of the Fourteenth Amendment, and some cases involve Congress's power under Section 2 of the Fifteenth Amendment. The two provisions are identically worded, and the Court has treated decisions under either as applicable to both.

<sup>83</sup> See *infra* notes 84–204 and accompanying text.

rational choice, or is Congress held to a higher standard, akin to the “strict scrutiny” the Court gives to legislative classifications based on race?

a. *South Carolina v. Katzenbach*

The first case addressing the scope of Congress’s enforcement powers under the Civil War Amendments was *South Carolina v. Katzenbach*,<sup>84</sup> in which the Supreme Court rejected a challenge by South Carolina to the constitutionality of several provisions of the Voting Rights Act.<sup>85</sup> Most interesting for our purposes is the Court’s disposition of the challenge to section 4 of the Act, which forbade the use of literacy tests as a voter eligibility criterion by “covered” states (in other words, states that had a recent history of using such tests in a discriminatory fashion to block Blacks from voting).

South Carolina argued that the Court had previously held that literacy tests are not a *per se* violation of the Fifteenth Amendment, even if they have the effect of disqualifying more Blacks than Whites,<sup>86</sup> yet section 4 forbade the use of facially neutral tests without inquiry into whether they are being discriminatorily administered (indeed, even if it can be proved that they are not). In South Carolina’s view, since the tests were not *prima facie* violations of the Fifteenth Amendment, Congress’s blanket prohibition of them—banning innocent as well as invidiously motivated tests—was not an appropriate exercise of its power to enforce that Amendment.<sup>87</sup> More generally, South Carolina argued that the power to enforce the Amendment did not permit overbreadth—i.e., did not permit Congress’s forbidding any practice not itself a violation of the Amendment.

The Court expressly rejected this narrow view of Congress’s power.<sup>88</sup> Even if a test used by South Carolina currently were free of discriminatory purpose, neutral on its face, and administered fairly—and thus not a violation of the Fifteenth Amendment—Congress would be free to forbid the use of literacy tests to overcome the lingering effects of *past* discrimination.<sup>89</sup> Whites who were illiterate were already registered (due to discriminatory administration of the tests in the past), and even-handed use of tests in the future to determine the eligibility of previously-unregistered voters would “freeze the effect of past discrimination in favor of unqualified white registrants.”<sup>90</sup> True, an alternative would be to require re-registration of everyone

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<sup>84</sup> 383 U.S. 301 (1966).

<sup>85</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1994)).

<sup>86</sup> *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959).

<sup>87</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966).

<sup>88</sup> *Id.* at 327.

<sup>89</sup> *Id.* at 333-34.

<sup>90</sup> *Id.* at 334. This same analysis produced a like result in *Gaston County v. United States*,

pursuant to a neutral literacy test, but "Congress permissibly rejected [this] alternative . . . believing that this would be too harsh on many whites who had enjoyed the franchise for their entire adult lives."<sup>91</sup>

More important than the precise holding in *South Carolina v. Katzenbach* was the Court's vision of the general scope of Congress's powers to enforce the Civil War Amendments. The Court declared:

The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to *one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.*<sup>92</sup>

The Court was emphatic that the Civil War Amendments represented an enlargement of Congress's powers, relative to both the states and the federal courts:

[T]he Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Amendment]. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the provisions by appropriate legislation. . . ." Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition. . . .<sup>93</sup>

The Court declared that the test to be applied in determining the scope of Congress's power under the Civil War Amendments "is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."<sup>94</sup> The Court declared that the "classic formulation" of that test, laid down by Chief Justice Marshall fifty years before the Civil War in *McCulloch v. Maryland*,<sup>95</sup> applied here as well, and it quoted that formulation: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>96</sup>

This principle, the Court explained, was "echoed" in the early decisions articulating Congress's powers under the Civil Rights Amendments:

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395 U.S. 285, 297 (1969).

<sup>91</sup> *South Carolina v. Katzenbach*, 383 U.S. at 334.

<sup>92</sup> *Id.* at 324 (emphasis added).

<sup>93</sup> *Id.* at 326 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1879)).

<sup>94</sup> *Id.*

<sup>95</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>96</sup> *South Carolina v. Katzenbach*, 383 U.S. at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)) (emphasis added).

Whatever legislation is appropriate, that is, *adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain*, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.<sup>97</sup>

Finally, the Court quoted yet another famous Marshall chestnut, this one from *Gibbons v. Ogden*,<sup>98</sup> and declared it applicable to Congress's powers under the Civil Rights Amendments: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."<sup>99</sup>

b. *Katzenbach v. Morgan*

The Court's second opinion in this quartet, *Katzenbach v. Morgan*,<sup>100</sup> is perhaps the most interesting, as it represents the broadest application of the principles declared in *South Carolina v. Katzenbach* (all of which were reiterated).<sup>101</sup> At issue was the validity of section 4(e) of the Voting Rights Act,<sup>102</sup> which forbade states' conditioning a person's eligibility to vote in federal, state, and/or local elections upon the ability to "read, write, understand, or interpret any matter in the English language" if the person had completed at least the sixth grade in a school in the United States (including Puerto Rico) "in which the predominant classroom language was other than English."<sup>103</sup> This provision had been inserted into the bill at the behest of Representatives and Senators from New York, and its purpose was to enfranchise those who had migrated from Puerto Rico to New York City.<sup>104</sup>

Section 4(e) was challenged as exceeding Congress's powers under the Fourteenth Amendment, because (1) an English-language requirement was not itself a violation of the Fourteenth Amendment, and (2) there was no antecedent constitutional violation for which enfranchising non-English-speaking Puerto Ricans

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<sup>97</sup> *Id.* at 327 (quoting *Ex parte Virginia*, 100 U.S. at 345–46 (emphasis added)). The Court noted that this language was employed again fifty years later with respect to conferral of similar power upon Congress in the Eighteenth Amendment. *Id.* (citing *James Everard's Breweries v. Day*, 265 U.S. 545, 558–59 (1924)).

<sup>98</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>99</sup> *South Carolina v. Katzenbach*, 383 U.S. at 327 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

<sup>100</sup> 384 U.S. 641 (1966).

<sup>101</sup> *Id.* at 648–51.

<sup>102</sup> 42 U.S.C. § 1973b(e) (1994).

<sup>103</sup> *Katzenbach v. Morgan*, 384 U.S. at 643 n.1.

<sup>104</sup> *Id.* at 644.

could be a remedy.<sup>105</sup> The Court rejected this argument by proffering two independent reasons, each sufficient in its own right, why section 4(e) “is . . . appropriate legislation to enforce the Equal Protection Clause.”<sup>106</sup>

The first reason assumed the correctness of the challengers’ contention that there was no antecedent constitutional violation. Even on that assumption, the Court concluded that enfranchising Puerto Ricans would increase their leverage within the political structure, and thereby reduce the prospect that they would suffer unconstitutional discrimination in the provision of governmental services generally:

[Section] 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications *and the provision or administration of government services, such as public schools, public housing and law enforcement.*

. . . The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community *the right that is preservative of all rights. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain “perfect equality of civil rights and the equal protection of the laws.”*<sup>107</sup>

*Katzenbach v. Morgan* thus establishes that Congress’s power to enforce the Fourteenth Amendment embraces quite generalized steps, taken without proof of past discrimination, simply because they are likely to reduce the danger of equal protection violations in the future.

In addition, the Court was emphatic that it was not the proper role of the judiciary to second-guess Congress’s assessment that such instrumental prophylactic steps are appropriate. The Court noted:

It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. *It was for Congress, as the branch that made this judgment, to assess and weight the various conflicting considerations—the risk of pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement . . . . It is*

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<sup>105</sup> *Id.* at 648.

<sup>106</sup> *Id.* at 650.

<sup>107</sup> *Id.* at 652–53 (citations and footnotes omitted) (emphasis added).

*not for us to review the congressional resolution of these factors. It is enough that we are able to perceive a basis upon which the Congress might resolve the conflict as it did.*<sup>108</sup>

The Court then turned to its second, independent rationale for upholding section 4(e); namely, that Congress might harbor legitimate concern that the English-literacy requirement was in fact invidiously motivated and thus violative of the Fourteenth Amendment. The mere existence of an objective basis for concern sufficed to entitle Congress to eliminate the possibility by banning the practice:

The result is no different if we confine our inquiry to the question whether § 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided, and evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. . . . Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause.<sup>109</sup>

The breadth and significance of the holdings in *Katzenbach v. Morgan* are highlighted by the observations of the two dissenting Justices, Harlan and Stewart.<sup>110</sup> They first concluded that, in applying traditional judicial standards, the New York English-literacy requirement did not violate the Equal Protection Clause. They decried the Court's allowance to Congress of a power to invalidate based only on a rational suspicion that the state law *might* be invidiously motivated.<sup>111</sup> They then addressed whether Congress might annul section 4(e) despite its constitutionality (the first rationale used by the Court). In their view, the absence of a "legislative record supporting" the "hypothesized discrimination" in other areas of public service precluded the prophylactic rationale the majority had embraced.<sup>112</sup>

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<sup>108</sup> *Id.* at 653 (emphasis added).

<sup>109</sup> *Id.* at 654–56 (citation and footnotes omitted). The Court went on to ask whether section 4(e) itself violated any other provision of the Constitution and, after concluding that it did not, declared section 4(e) an appropriate exercise of Congress's Fourteenth Amendment power. *Id.* at 656–658.

<sup>110</sup> *Id.* at 659–71.

<sup>111</sup> *Id.* at 664–66.

<sup>112</sup> *Id.* at 666–67. The dissent also characterized the majority opinion as redefining the

c. *Oregon v. Mitchell*

In *Oregon v. Mitchell*,<sup>113</sup> the Court unanimously upheld a 1970 amendment to the Voting Rights Act that extended the ban on literacy tests to the entire country for five years (the ban had previously been applicable only to seven states).<sup>114</sup> But, by a 5–4 decision, the Court struck down Congress’s effort to require states to lower their voting age to eighteen for state and local elections.<sup>115</sup> There was no majority opinion for the Court, but the several opinions shed light on the breadth of the power conferred on Congress to enforce the Fourteenth Amendment.

The five votes denying Congress the power to lower the voting age in state elections noted that those individuals 18–20 were not a discrete and insular minority and Congress had made no findings suggesting they were victims of, or vulnerable to, constitutional violations.<sup>116</sup> The several opinions that collectively upheld the extension of the literacy ban to the entire nation—in the face of Arizona’s contention that there was no justification for concluding that Arizona’s literacy test had ever been used to violate the Constitution—offered illuminating insights on the Justices’ understanding of Congress’s power.

Justice Stewart, whose opinion was joined by Chief Justice Burger and Justice Blackmun, began by noting that whether or not the problem existed in all states, Congress had fairly concluded that there were serious problems in at least some states.<sup>117</sup> Without ever questioning Arizona’s claim that there was no problem *in Arizona* warranting an exercise of Congress’s power, this opinion declared that a nationwide ban nonetheless was an appropriate exercise of congressional power:

Congress has now undertaken to extend the ban on literacy tests to the whole Nation. I see no constitutional impediment to its doing so. Nationwide application

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substantive content of the Fourteenth Amendment, *id.* at 668—a charge that is not consistent with the text of the majority opinion, but which “stuck” as an arguing point until rejected by the modern Court. *See City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

<sup>113</sup> 400 U.S. 112 (1970).

<sup>114</sup> Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified at 42 U.S.C. § 1973 (1994)).

<sup>115</sup> *Mitchell*, 400 U.S. at 118. The Court made two other holdings in *Mitchell* that are not relevant to the issues in this paper. First, Congress was within its power in reducing residency requirements for state and local elections, as state bans violated the right to travel interstate; and second, Congress appropriately exercised its powers respecting eligibility to vote for federal office in lowering the voting age to eighteen for federal elections. *Id.* at 118–24.

<sup>116</sup> *See, e.g., id.* at 212–13 (Harlan, J., concurring in part and dissenting in part); *id.* at 281 (Stewart, J., concurring in part and dissenting in part).

<sup>117</sup> *Id.* at 280–82 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J., & Blackmun, J.).

reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country. This in turn increases the likelihood of voluntary compliance with the letter and spirit of federal law. Nationwide application facilitates the free movement of citizens from one State to another, since it eliminates the prospect that a change in residence will mean the loss of a federally protected right. Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not. Such a line may well appear discriminatory to those who think themselves on the wrong side of it. Moreover the application of the line to particular States can entail a substantial burden on administrative and judicial machinery and a diversion of enforcement resources. Finally, nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one and reflects a national commitment to its solution. . . .

*Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings . . . In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. . . . Experience gained under [an earlier statute] has now led Congress to conclude that it should go the whole distance. This approach to the problem is a rational one; consequently it is within the constitutional power of Congress [under the Civil War Amendments].*<sup>118</sup>

Justice Harlan's opinion took much the same stance:

Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of [the Civil War Amendments] was sufficient to authorize the exercise of congressional power [thereunder].

*Whether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make. The fact that the suspension is only for five years will require Congress to reevaluate at the close of that period. While a less sweeping approach in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable.*<sup>119</sup>

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<sup>118</sup> *Id.* at 283–84 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J., & Blackmun, J.) (citations and footnotes omitted) (emphasis added).

<sup>119</sup> *Id.* at 216–17 (Harlan, J., concurring in part and dissenting in part) (footnotes omitted) (emphasis added).



It is striking to recall that, at the time, Justices Stewart and Harlan, the authors of the two opinions just quoted, were the most conservative Justices on the Court with respect to Congress's powers under the Civil War Amendments (as they were on most issues); indeed, they had dissented in *Katzenbach v. Morgan*.<sup>120</sup> Yet they embraced the view that Congress could nationalize a solution to a problem based on localized evidence of discrimination and congressional concern that the prejudice that fueled that discrimination was more widely shared. And even they agreed that the scope of judicial review of the congressional action was a narrow one: the law must be upheld if Congress was "rational"<sup>121</sup> or "within the range of the reasonable."<sup>122</sup>

Justice Brennan, in an opinion joined by Justices White and Marshall, also championed uniformity. Congress was free to ban literacy tests nationwide, even if Arizona had never discriminated, because such tests would perpetuate the effect of past racial discrimination in education in other states from whence Arizona citizens might have come.<sup>123</sup> The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."<sup>124</sup> This opinion, too, identified the reviewing lens as whether the Court can "perceive a rational basis for the congressional judgments."<sup>125</sup>

The remaining two Justices, Black and Douglas, authored opinions relying on what they believed was evidence that there was unconstitutional behavior in all the states.<sup>126</sup>

#### d. *City of Rome v. United States*

The last of the initial quartet of decisions defining the scope of Congress's power under the Fourteenth and Fifteenth Amendments—and the first issued by a Court that included any of its present members<sup>127</sup>—was *City of Rome v. United States*.<sup>128</sup> The City of Rome wished to change its election rules in a variety of respects, including,

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<sup>120</sup> 384 U.S. 641, 659 (1966).

<sup>121</sup> *Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part).

<sup>122</sup> *Id.* at 217 (Harlan, J., concurring in part and dissenting in part).

<sup>123</sup> *Id.* at 235–36 (Brennan, J., concurring in part and dissenting in part, joined by White & Marshall, JJ.).

<sup>124</sup> *Id.* at 233 (Brennan, J., concurring in part and dissenting in part, joined by White & Marshall, JJ.) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

<sup>125</sup> *Id.* at 231 (Brennan, J., concurring in part and dissenting in part, joined by White & Marshall, JJ.).

<sup>126</sup> *See id.* at 117 (opinion written by Black, J.); *id.* at 135 (opinion written by Douglas, J.).

<sup>127</sup> Justices Stevens and Rehnquist had joined the Court in the years since *Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>128</sup> 446 U.S. 156 (1980).

inter alia, going from regional to "at large" election of all city council members and annexing new neighborhoods into the city (and hence its electorate). What stood in the city's way was the obligation, under the Voting Rights Act, to secure "clearance" from the Attorney General.<sup>129</sup> The Attorney General refused to clear the proposed changes because, albeit free of discriminatory purpose, they would have a "discriminatory impact," i.e., the changes might weaken the chances of Blacks being elected to city office. The city contended that the federal government was without power to ban innocently motivated election changes simply because of their effect.<sup>130</sup>

The Court rejected the challenge by a 6-3 vote. The Court observed that it had already held that Congress could ban practices not themselves unconstitutional, if they were appropriate to remedy or prevent denials of equal protection.<sup>131</sup> In the area of voting rights, the Southern states had shown themselves ready to use "unremitting and ingenious" devices to continue the exclusion of Black voters.<sup>132</sup> Congress could "rationally" conclude that barring practices with discriminatory impact would prevent practices that were infected with a discriminatory purpose eluding detection:

In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. We find no reason, then, to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from "undo[ing] or defeat[ing] the rights recently won' by Negroes."<sup>133</sup>

Justice Stevens joined this opinion, but Justice Rehnquist dissented. That dissent is important as he is now part of the prevailing majority on the Court. Justice Rehnquist began by noting the lower court finding, ignored in the Court's opinion, that "Rome has not employed any discriminatory barriers to black voter registration in the past 17 years"; indeed, the city had in recent years been supportive of Blacks'

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<sup>129</sup> Georgia and all its cities were subject to the preclearance requirements of section 4 of the Voting Rights Act, 42 U.S.C. § 1973b (1994).

<sup>130</sup> The Court had ruled in *Washington v. Davis*, 426 U.S. 229 (1976), that practices which are innocently motivated do not violate the Equal Protection Clause, even though they have disparate effects.

<sup>131</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>132</sup> *City of Rome*, 446 U.S. at 174 (quoting *South Carolina v. Katzenbach*, 383 U.S. at 309).

<sup>133</sup> *Id.* at 177-78 (quoting *Beer v. Unites States*, 425 U.S. 130, 140 (1976) (quoting H.R. REP. NO. 91-397, at 8 (1969), reprinted in 1970 U.S.C.C.A.N. 3277)) (footnote and citations omitted).

efforts to run for elective posts.<sup>134</sup> Additionally, the city had proved, to the District Court's satisfaction, that the proposed changes were not discriminatorily motivated.<sup>135</sup> He thus described the Court's holding as follows:

The Court holds today that the city of Rome can constitutionally be compelled to seek congressional approval for most of its governmental changes even though it has not engaged in any discrimination against blacks for at least 17 years. Moreover, the Court also holds that federal approval can be constitutionally denied even after the city has proved that the changes are not purposefully discriminatory.<sup>136</sup>

Justice Rehnquist recognized that Congress has power to go beyond what the judiciary can do to enforce the Civil War Amendments: "It has never been seriously maintained . . . that Congress can do no more than the judiciary to enforce the Amendments' commands."<sup>137</sup> "Congress can act remedially to enforce the judicially established substantive prohibitions of the Amendments."<sup>138</sup> However, Congress cannot redefine the substantive sweep of the Amendment.<sup>139</sup>

While the Fourteenth and Fifteenth Amendments prohibit only purposeful discrimination, the decisions of this Court have recognized that in some circumstances, congressional prohibition of state or local action which is not purposefully discriminatory may nevertheless be appropriate remedial legislation under the Civil War Amendments.

*Those circumstances, however, are not without judicial limits.* [The Court's] decisions indicate that congressional prohibition of some conduct which may not itself violate the Constitution is "appropriate" legislation "to enforce" the Civil War Amendments if that prohibition is *necessary* to remedy prior constitutional violations by the governmental unit, or if *necessary* to effectively prevent purposeful discrimination by a governmental unit.<sup>140</sup>

The injection of "necessity" as a prerequisite to congressional prohibition of otherwise constitutionally permissible conduct marked the distinction between Justice Rehnquist's view and the view adopted by the Court. He agreed that Congress could shift the burden of proof to the states to prove absence of bad purpose, but disagreed that Congress could deny the state the right to act once it had borne that burden:

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<sup>134</sup> *Id.* at 208 (Rehnquist, J., dissenting).

<sup>135</sup> *Id.* at 209 (Rehnquist, J., dissenting).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 210 (Rehnquist, J., dissenting).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 210–11.

<sup>140</sup> *Id.* at 213 (Rehnquist, J., dissenting) (citation omitted) (emphasis added).

[G]iven the difficulties of proving that an electoral change or annexation has been undertaken for the purpose of discriminating against blacks, Congress could properly conclude that as a remedial matter it was necessary to place the burden of proving lack of discriminatory purpose on the localities. But all of this does not support the conclusion that Congress is acting remedially when it continues the presumption of purposeful discrimination even after the locality has disproved that presumption.<sup>141</sup>

Justice Rehnquist conceded that in *South Carolina v. Katzenbach* and *Oregon v. Mitchell* the Court had upheld flat prohibitions on facially neutral conduct (literacy tests) without affording the states an opportunity to prove their innocent motivation. But those cases involved special circumstances: a demonstration of such latent contemporary mischief as to make a flat ban the “only” effective way to “prevent the occurrence of purposeful discrimination.”<sup>142</sup> No such urgency attended this case, in which the city’s reformed ways were evident. The upshot, Justice Rehnquist concluded, is that what the Court was *really* doing (without admitting it) was to allow Congress power to redefine the substantive content of the Civil War Amendments so as to ban discriminatory effect as well as discriminatory purpose. And, he insisted, the judiciary having interpreted those amendments differently, Congress was without power to disagree.<sup>143</sup>

e. *Lessons of the “First Quartet”*

A fair reading of these cases, *en toto*, yields the following principles:

1. Congress’s power to enforce the Fourteenth Amendment allows it to ban conduct that is not itself violative of that Amendment, if the “overbreadth” is “appropriate” to assure citizens the full protection of that Amendment.

2. One “appropriate” purpose for overbreadth is to prevent invidiously-motivated state actions that might go unchecked because the bad motive will escape detection. (Three of the Court’s decisions approve this principle,<sup>144</sup> by upholding statutes that ban practices altogether without inquiry into the purpose animating the practices. These statutes ban the practices in order to ensure that they are not engaged in with undetectable discriminatory purpose.)

3. Another “appropriate” purpose, articulated in *Katzenbach v. Morgan*, is more broadly instrumental: to alter the legal landscape in a manner that reduces the chances that states will engage in invidiously-motivated behavior.<sup>145</sup>

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<sup>141</sup> *Id.* at 214 (Rehnquist, J., dissenting) (citation omitted).

<sup>142</sup> *Id.* at 215–16 (Rehnquist J., dissenting).

<sup>143</sup> *Id.* at 219–21 (Rehnquist, J., dissenting).

<sup>144</sup> See *City of Rome*, 446 U.S. 156; *Oregon v. Mitchell*, 400 U.S. 112 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>145</sup> 384 U.S. 641 (1966). The “appropriate” purpose in this case was ensuring that minorities

4. In reviewing Congress's determination that a prohibition is "appropriate," the Court will apply rational-basis review, deferring to Congress's assessment unless it is irrational.

## 2. Quartet #2. The Modern Cases: Is There Retreat?

After *City of Rome v. United States*, the Court went seventeen years without again addressing the scope of Congress's enforcement powers under Section 5 of the Fourteenth Amendment. During that period, the composition of the Court changed radically. When *City of Boerne v. Flores* was decided in 1997,<sup>146</sup> only two Justices remained from the Court that had decided *City of Rome*. Among others, Justices Brennan, Marshall, Blackmun, and White were gone. Justices Scalia, Thomas, O'Connor, and Kennedy—Justices whose views coincide more often with those of Justice Rehnquist, who had been the lone dissenter in *City of Rome*—had joined the Court.

This newly composed Court has, in the past three years, issued its own quartet of decisions addressing the scope of Congress's Fourteenth Amendment power. The common wisdom is that these decisions signal a retreat from the broad vision of Congress's power reflected in the earlier quartet.<sup>147</sup> Is that true? Or is it simply that the laws examined in the second quartet were less appropriate implementers of the Fourteenth Amendment than those in the first quartet? Recall that one congressional statute was struck down even in the early era: Congress's effort to lower the voting age in state and local elections from twenty-one to eighteen. It was struck down because Congress had no reason to think that eighteen to twenty-year-olds were a group suffering (or threatened with suffering) discrimination violative of the Fourteenth Amendment. So, it was always a staple of the Court's conception of the Fourteenth Amendment that Congress could not resort to overbreadth—to banning conduct that might be constitutional—unless there was reason to fear that absent that step a real risk of unconstitutional behavior existed.

Recall also that all four decisions in the first quartet involved a single subject area, voting rights, as to which discrimination against Blacks had been virulent for centuries and surely remained prevalent in at least some parts of the country when the statute was enacted. The Court's willingness to uphold powerful congressional action to confront a pinpointed problem of egregious dimension does not necessarily mean

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had a sufficient voice in the political process to protect themselves. *Id.* at 653–55.

<sup>146</sup> 521 U.S. 507 (1997).

<sup>147</sup> See, e.g., Joanne C. Brant, *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPLOYMENT RTS. & EMPLOYMENT POL'Y J. 175, 199 (1998); Jesse H. Choper, *On the Difference in Importance between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996–1997 Term*, 19 CARDOZO L. REV. 2259, 2292 (1998); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 917 (1999).

that that Court would have been equally comfortable with across-the-board statutes regulating states from stem to stern, as Title II of the ADA does.<sup>148</sup>

Surely, the *language* of the early quartet is broad enough to suggest that the Court of that era would have upheld the statutes that the Court has confronted in the past three years. But, the Court's commitment to the breadth of that language was never put to the test.

The current Court has not suggested any doubt about the validity of any of the decisions in the original quartet and indeed has reiterated virtually all of the general principles announced in those earlier cases. Its explanation for striking down the statutes in recent cases has been, invariably, to the effect that "this statute is different." Yet, though the Court has been careful to insist that it is not overruling those earlier cases, it is surely doubtful that the Court as presently constituted would have upheld the statutes in *Katzenbach v. Morgan* or *City of Rome* (from which, recall, Justice Rehnquist dissented). One may wonder whether the Court is paying lip service to the earlier opinions while, as a practical matter, relegating them to the junk pile.<sup>149</sup>

The decision in *Garrett* likely will reveal the Court's true hand, for, as will be shown in Part III, the case for Fourteenth Amendment grounding of the ADA is stronger than was true of the RFRA, the Patent Remedy Act (PRA), the ADEA, and the VAWA. To gauge that, it is necessary first to examine the quartet of decisions that found these statutes wanting.

#### a. *City of Boerne v. Flores*

The new era was launched with the Court's decision in *City of Boerne v. Flores*.<sup>150</sup> The question was whether the RFRA<sup>151</sup> was an appropriate exercise of Congress's Fourteenth Amendment power. The Court held that it was not.

The RFRA had been enacted by Congress in response to the Court's holding, in *Employment Division v. Smith*,<sup>152</sup> that the "free exercise of religion" clause of the First Amendment, incorporated into the Fourteenth Amendment, does not require states to make exceptions to laws of general applicability to facilitate religious practice.<sup>153</sup> The Oregon law at issue in *Smith* made ingestion of narcotics a crime and

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<sup>148</sup> 42 U.S.C. §§ 12131–12165 (1994).

<sup>149</sup> The four Justices in the current minority have accused the majority of doing precisely that in the Court's recent rulings assaying Congress's power under the Commerce Clause. *United States v. Morrison*, 120 S. Ct. 1740, 1766 (2000) (Souter, J., dissenting, joined by Stevens, Ginsburg, & Breyer, JJ) (to be published at 529 U.S. 598 (2000)).

<sup>150</sup> 521 U.S. 507 (1997).

<sup>151</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (1994).

<sup>152</sup> 494 U.S. 872 (1990).

<sup>153</sup> *Id.* at 884–85.

recognized no exception for smoking peyote as a religious practice.<sup>154</sup> The plaintiff in *Smith* argued that the state was obliged to permit his religious practice unless it conflicted with a compelling state interest.<sup>155</sup> He relied on prior interpretations of the Free Exercise Clause that appeared to support his position.<sup>156</sup> But a bare majority of the Court in *Smith* ran roughshod over those precedents, announcing a broad new principle that states may enforce neutral laws without making an exception for religious observance, so long as the laws were not enacted *for the purpose of* forbidding religious practice.<sup>157</sup>

Congress reacted promptly by enacting the RFRA, which attempted to reestablish the rule of the prior Supreme Court cases by prohibiting all governments from “substantially burdening” a person’s exercise of religion, even if the burden results from a rule of general applicability, unless the government can demonstrate that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>158</sup> Its power under the Fourteenth Amendment was Congress’s only predicate for enacting this law.

The Court saw the statute as a congressional attempt to impose Congress’s view of the meaning of the Fourteenth Amendment in preference to the Court’s view. That was an abuse of Congress’s power. The Court is the ultimate interpreter of the Fourteenth Amendment. Once the Court says what the Fourteenth Amendment means, Congress has no power emanating from the Fourteenth Amendment to superimpose a contrary view.<sup>159</sup>

With this established, the Court turned to a consideration of whether the RFRA could be justified as preventing or remedying violations of the Free Exercise Clause as the Court had construed it in *Smith*. The RFRA’s defenders, invoking the decisions of the first quartet, argued that the RFRA was an appropriate mechanism to “prevent[ ] and remed[y] laws which are enacted with the unconstitutional object of targeting religious beliefs and practices.”<sup>160</sup> The *City of Boerne* Court acknowledged that “Congress can prohibit laws with discriminatory effects in order to prevent . . . discrimination in violation of the Equal Protection Clause,”<sup>161</sup> but it

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<sup>154</sup> OR. REV. STAT. § 475.992(4) (1987).

<sup>155</sup> *Smith*, 521 U.S. at 882.

<sup>156</sup> See *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>157</sup> *Smith*, 521 U.S. at 882.

<sup>158</sup> 42 U.S.C. § 2000bb-1 (1994).

<sup>159</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519–29 (1997).

<sup>160</sup> *Id.* at 529 (citation omitted).

<sup>161</sup> *Id.*

announced and applied two limits on the use of that prophylactic. The first is the requirement of a serious constitutional problem in need of redress:

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

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... Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.<sup>162</sup>

The RFRA foundered at this first step because the "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years."<sup>163</sup> Indeed, the legislative record reflected Congress's awareness that deliberate governmental persecution of religion was virtually nonexistent.<sup>164</sup> While the existence of a sufficient predicate for prophylactic legislation does not depend solely "on the state of the legislative record Congress compiles,"<sup>165</sup> there was no evidence outside that record to the contrary, and "Congress' concern" in enacting the RFRA "was with the incidental burdens imposed, not the object or purpose of the legislation."<sup>166</sup>

The Court then unveiled the second limit on Congress's resort to prophylactic legislation: that it be proportional and congruent with the constitutional problem.<sup>167</sup> Against a backdrop of little, if any, unconstitutional behavior, the RFRA invalidates all neutral laws and official actions that have a disparate impact, reaches every corner of governmental action, and does so indefinitely as the RFRA has no termination date or termination mechanism.<sup>168</sup> In these respects, the RFRA goes far beyond the one-issue pinpointed statutes that were upheld in the first quartet.<sup>169</sup>

While demolishing the RFRA, the Court repeatedly emphasized the wide latitude Congress enjoys in determining the need for and shape of legislation enforcing the Fourteenth Amendment and also the concomitant broad deference the Court owes Congress in assessing whether the exercise of that power is within constitutional

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<sup>162</sup> *Id.* at 530, 532 (citations omitted).

<sup>163</sup> *Id.* at 530.

<sup>164</sup> *Id.* at 530-31.

<sup>165</sup> *Id.* at 531.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 533.

<sup>168</sup> *Id.* at 532.

<sup>169</sup> *See id.* at 532-33.



bounds.<sup>170</sup> The innocent reader might have concluded that the result in *City of Boerne* was an isolated occurrence driven by the Court's perception that Congress's real goal was to rewrite the substance of the Fourteenth Amendment rather than enforce the less ambitious version recognized by the Court in *Smith*. But stay tuned!

Significantly, no Justice argued that the RFRA was a proper exercise of Congress's Section 5 power if *Smith* correctly defined the reach of the Free Exercise Clause. The three dissenters wished, rather, to re-examine the correctness of *Smith*, for if the proper construction of the Constitution is as declared in the pre-*Smith* decisions, then the RFRA was prohibiting only that which the Fourteenth Amendment already prohibits.<sup>171</sup>

b. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>172</sup> the Court addressed the constitutionality of the provision in the Patent Remedy Act<sup>173</sup> authorizing patent holders to sue states that infringe patents.<sup>174</sup> Congress declared that it was exercising its powers under the Patent Clause,<sup>175</sup> the Commerce Clause,<sup>176</sup> and the Fourteenth Amendment. The majority in this 5–4 decision applied *Seminole Tribe* in holding that the Patent and Commerce Clause predicates for the Act were insufficient to lift the state's Eleventh Amendment immunity.<sup>177</sup> Inquiry focused, thus, on whether the Act was a proper exercise of Congress's power to enforce the Fourteenth Amendment.

The patent holders and the Solicitor General argued that the Patent Remedy Act was aimed at securing the Fourteenth Amendment's protections against deprivations of property without due process of law.<sup>178</sup> The Court expressed some doubt whether patent infringement by states would violate the Fourteenth Amendment,<sup>179</sup> but that was not its basis for holding that the Act was not an appropriate exercise of

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<sup>170</sup> *Id.* at 517–18, 519–20, 536.

<sup>171</sup> *Id.* at 544 (O'Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

<sup>172</sup> 119 S. Ct. 2199 (1999) (to be published at 527 U.S. 627 (1999)).

<sup>173</sup> Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271, 296 (1994).

<sup>174</sup> 35 U.S.C. §§ 271(h), 296(a) (1994).

<sup>175</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>176</sup> *Id.* at cl. 3.

<sup>177</sup> *Coll. Sav. Bank*, 119 S. Ct. at 2202.

<sup>178</sup> *Id.* at 2208.

<sup>179</sup> *Id.* at 2207.

Congress's Section 5 power. Rather, the Court relied on the paucity of evidence that there was a serious constitutional problem needing correction.

"Congress identified no pattern of patent infringement by the States. . . ."<sup>180</sup> The Court noted that there had been only eight patent infringement suits prosecuted against states in the 110 years between 1880 and 1990. The Patent Remedy Act thus foundered at the first hurdle erected in *City of Boerne*: there was no constitutional problem that needed fixing.

The four dissenters reiterated their stance that the Eleventh Amendment does not preclude Congress's authorization of private suits to enforce legislation adopted pursuant to Congress's Article I powers.<sup>181</sup> They also disagreed with the majority's assessment of whether Congress had identified a constitutional problem sufficient to exercise its Section 5 power.<sup>182</sup>

### c. *Kimel v. Florida Board of Regents*

The Court's decision in *Kimel v. Florida Board of Regents*,<sup>183</sup> another 5–4 decision, is the most pertinent to the fate of the ADA, as it too involved a statute forbidding employment discrimination, the ADEA.<sup>184</sup> The Court's opinion, this time authored by Justice O'Connor, contains expansive statements of the scope of Congress's Section 5 power:

Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.

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... Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.<sup>185</sup>

But in the end, these prove to have been just a tease. For despite the overwhelming documentation in the legislative history of the ADEA of the disadvantages

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 2219 (Stevens, J., dissenting, joined by Souter, Ginsberg, & Breyer, JJ).

<sup>182</sup> *Id.* at 2213–17.

<sup>183</sup> 120 S. Ct. 631 (2000) (to be published at 528 U.S. 62 (2000)).

<sup>184</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (1994 & Supp. IV 1998).

<sup>185</sup> *Kimel*, 120 S. Ct. at 644, 648.

encountered by older persons in the workplace, the Court ruled that the ADEA flunked both parts of the two-part test decreed in *City of Boerne*.

Because classifications based on age are subject only to rational-basis review, “[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.”<sup>186</sup> Because “increasing age brings with it increasing susceptibility to physical difficulties,”<sup>187</sup> it is rational for employers to prefer younger workers; granted, not all older workers will have increased physical difficulties, but employers have an economic interest in avoiding the “search costs” that would be entailed in making individualized assessments.<sup>188</sup>

It follows that the use of age would violate the Fourteenth Amendment only if motivated by invidious prejudice. But “[o]lder persons . . . unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a ‘history of purposeful unequal treatment,’” and the reason why is obvious: everyone hopes to join the club.<sup>189</sup>

This assessment was confirmed by the ADEA’s legislative record. “Congress never identified any pattern of age discrimination by the states, much less any discrimination whatsoever that rose to the level of constitutional violation.”<sup>190</sup> Isolated snippets in the legislative materials would be insufficient in any event to establish that unconstitutional age discrimination had become “a problem of national import,” but in truth the *only* evidence in the record was of rational use of age in filling law enforcement and fire-fighting occupations—a use that does not violate the Fourteenth Amendment.<sup>191</sup> Most significantly, Congress made no findings that states were committing unconstitutional age discrimination.<sup>192</sup>

With the conclusion that there was no constitutional problem respecting age, it followed inevitably that the second hurdle—that the legislation be congruent and proportional to the problem—could not be surmounted. The ADEA bans a wide swath of conduct without requiring proof that it is invidiously motivated. Without reason to think that there might be improper motivation underlying that conduct, there is no justification for banning lawful conduct as a prophylactic against nonexistent

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<sup>186</sup> *Id.* at 646.

<sup>187</sup> *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)).

<sup>188</sup> *Id.* at 645–46. On the basis of this insight, the Court prior to *Kimel* had upheld state-imposed maximum age limits for state judges, foreign service officers, and police officers. *See generally* *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

<sup>189</sup> *Kimel*, 120 S. Ct. at 645 (quoting *Murgia*, 427 U.S. at 313 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973))).

<sup>190</sup> *Kimel*, 120 S. Ct. at 649.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

unconstitutional behavior. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."<sup>193</sup>

The four dissenters in *Kimel* relied solely on their disagreement about the meaning of the Eleventh Amendment.<sup>194</sup> The ADEA was concededly an appropriate exercise of Congress's Commerce Clause power,<sup>195</sup> which is sufficient to empower Congress to authorize private suits for its enforcement.<sup>196</sup> Curiously, the dissenters made no reference to the alternative Fourteenth Amendment grounding for the ADEA. Does this signify doubt on their part that the ADEA could pass muster under the Fourteenth Amendment, or simply a desire to emphasize the degree of their hostility to *Seminole Tribe* by championing the Article I provenance for the provision struck down in *Kimel*?<sup>197</sup>

d. *United States v. Morrison*

In its most recent decision respecting Congress's Section 5 power, *United States v. Morrison*,<sup>198</sup> the Court struck down, again by a 5-4 vote, the provision in the Violence Against Women Act conferring a federal cause of action enabling victims of gender violence to sue the perpetrators for damages.<sup>199</sup> Congress invoked two sources of power for the enactment: its Commerce Clause power, and its Section 5 power to enforce the Fourteenth Amendment.

The Court rejected Congress's reliance on the Commerce Clause, applying the Court's new calculus for determining the scope of that power, first announced in *United States v. Lopez*: that the Commerce Clause does not authorize Congress's regulation of noncommercial activity not tied to the crossing of state lines simply because the aggregate of all incidents of that noncommercial conduct have an effect on interstate commerce.<sup>200</sup> This is, of course, another piece of the Court's present mission to contract the power of the federal government *vis-a-vis* the states, but as it

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<sup>193</sup> *Id.* at 648 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)).

<sup>194</sup> See *supra* note 77 and accompanying text.

<sup>195</sup> The opinion for the Court acknowledged its prior holding that the ADEA is a valid exercise of Congress's power under the Commerce Clause. *Kimel*, 120 S. Ct. at 635 (citing *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983)).

<sup>196</sup> *Kimel*, 120 S. Ct. at 652 (Stevens, J., dissenting).

<sup>197</sup> The only elliptical reference to the Fourteenth Amendment is the inclusion, as one of the reasons for the wrongness of *Seminole Tribe*, that it "unnecessarily forces the Court to resolve vexing questions of constitutional law respecting Congress' § 5 authority." *Id.* at 653.

<sup>198</sup> 120 S. Ct. 1740 (2000).

<sup>199</sup> 42 U.S.C. § 13981 (1994).

<sup>200</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

is beyond the scope of this paper, this part of the *Morrison* opinion will not be further described.

Removing the Commerce Clause prop meant that the fate of the civil suit in the VAWA now turned on the Court's ruling respecting the Fourteenth Amendment. Here, for the first time in the second quartet, the Court acknowledged that Congress had identified a serious problem of unconstitutional state behavior:

Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. *This assertion is supported by a voluminous congressional record.* Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence.<sup>201</sup>

But the VAWA foundered at the second hurdle: the Court ruled that it is not a congruent or proportional response to the constitutional problem Congress identified. The problem is discrimination by state actors in processing claims of gender violence. But the solution is not addressed to the state. Instead, it is aimed at the perpetrator of the violence, who is not a state actor and could not have violated the Fourteenth Amendment.<sup>202</sup>

This seems an extremely weak justification for invalidating the VAWA. But it is beyond the scope of this paper, for the challenged provision of the ADA, unlike that in the VAWA, is addressed to the state and thus escapes the rationale that led to invalidation in *Morrison*.

The decision in *Morrison* drew a dissent from the four expected Justices. All would have upheld the challenged provision as a proper exercise of Congress's Commerce Clause power; these Justices reject the incursions on that power that *Lopez* and *Morrison* have created.<sup>203</sup> Two of the four also "doubt[ed] the Court's reasoning" that Fourteenth Amendment legislation cannot be aimed at private parties who have profited from the state's discrimination.<sup>204</sup>

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<sup>201</sup> *Morrison*, 120 S. Ct. at 1755 (emphasis added).

<sup>202</sup> *Id.* at 1758.

<sup>203</sup> *See id.* at 1764–74 (Souter, J., dissenting).

<sup>204</sup> *Id.* at 1778 (Breyer, J., dissenting, joined by Stevens, J.).

### III. ASSESSING GARRETT AND THE PROSPECTS FOR THE ADA

In the ADA, Congress declared that it was exercising its powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. There can be little doubt that the employment provisions of the ADA are an appropriate exercise of Congress's Commerce Clause power. The Court has repeatedly held that state employment sufficiently impacts upon interstate commerce to justify Congress's regulation of employment terms, and indeed, the Court expressly stated in *Kimel*—which postdated *Lopez*—that the ADEA is an appropriate exercise of Congress's Commerce Clause power.<sup>205</sup> There is no reason to think that the Court's decision in *Morrison*, issued just five months after *Kimel*, marks any retreat in that respect. *Morrison* professed not to be expanding upon *Lopez*, and it was rationalized entirely on the noneconomic character of violence against women. State employment is economic activity.<sup>206</sup> Therefore, under the *Lopez-Morrison* test, so long as the subject of regulation is commercial and affects interstate commerce in the aggregate, its intrastate character does not put it outside the reach of Congress's Commerce power.<sup>207</sup>

The fact that Congress properly exercised its Commerce Clause power in enacting the ADA will not vindicate the ADA's authorization of private lawsuits against states. *Seminole Tribe* holds that the Eleventh Amendment trumps the Commerce Clause on this dimension.<sup>208</sup> Only if the ADA is *also* a proper exercise of Congress's power to enforce the Fourteenth Amendment will the authorization of private suits against states be constitutional; on this dimension, the Fourteenth Amendment trumps the Eleventh.

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<sup>205</sup> *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 643 (2000) (to be published at 528 U.S. 62 (2000)).

<sup>206</sup> The sale of labor, no less than the sale of products, is commerce.

<sup>207</sup> The statutes in *Lopez* and *Morrison* fell because they attempted to regulate noncommercial practices that do not cross state lines: carrying guns in school zones and gender violence, respectively. *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Morrison*, 120 S. Ct. 1740 (to be published at 529 U.S. 598 (2000)). Under the holdings in those cases, the Commerce Clause does not reach intrastate noncommercial activity simply because, in the aggregate, it affects interstate commerce. There likely will be debates whether all of the applications of Title II of the ADA apart from employment are properly grounded in the Commerce Clause as commerce has been redefined in *Lopez-Morrison*. Some state activities are surely commercial in character. *See, e.g., Erickson v. Bd. of Governors of State Colls. & Univs. for N.E. Ill. Univ.*, 207 F.3d 945 (7th Cir. 2000) (holding that universities are commercial in character). But as to others, the commercial character is debatable. *See, e.g., Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) (discussing whether Title II of the ADA prohibits disability discrimination in access to rehabilitation programs within prison).

<sup>208</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996).

A. *When Does Disability Discrimination Violate the Fourteenth Amendment?*

To assess whether there was a serious constitutional problem at the time the ADA was enacted, we need to know what conduct toward persons with disabilities *would* violate the constitution. The relevant provision is the Equal Protection Clause. The Court has issued one decision in which disability discrimination was found to be a denial of equal protection: *City of Cleburne v. Cleburne Living Center, Inc.*<sup>209</sup>

In *Cleburne*, the Court refused to apply heightened scrutiny to distinctions based on mental retardation, because (1) unlike race, distinctions between persons with and without mental retardation often will be legitimate (and not automatically “suspect”) and (2) given the apparent societal interest in accommodating mental retardation, heightened scrutiny might render constitutionally suspect (as reverse discrimination) steps taken to afford equal opportunity to persons with mental retardation.<sup>210</sup> Significantly, the Court did not suggest that other criteria that have triggered heightened scrutiny for classifications based on race—the discrete and insular character of a group, the history of past discrimination against its members, and their political powerlessness—were inapplicable to persons with mental retardation. On the contrary, in *Cleburne* and elsewhere, the Court recognized the history of mistreatment of persons with mental retardation.<sup>211</sup> The *Cleburne* Court likely would have refused to apply heightened scrutiny to other forms of disability as well; indeed, it hinted as much in a passage suggesting that the adoption of heightened scrutiny for mental retardation would embark the Court on a slippery slope that would logically result in a similar status for age and physical disability.<sup>212</sup>

Because it rejected heightened scrutiny, the *Cleburne* Court stated that it would evaluate the zoning ordinance’s constitutionality by asking whether it had a “rational basis.”<sup>213</sup> The Court held that the ordinance was not rational, as the city’s proffered reasons for excluding group homes for the mentally retarded could not be squared with its permission for fraternity houses and student dormitories that posed the same problems.<sup>214</sup> The Court concluded that antipathy for, or fear of, persons with mental retardation, and not the neutral reasons proffered by the city, explained the differential treatment.<sup>215</sup>

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<sup>209</sup> 473 U.S. 432 (1985) (holding unconstitutional a zoning ordinance that forbade group homes for persons with mental retardation, but allowed fraternity houses and student dormitories).

<sup>210</sup> See *id.* at 442–47.

<sup>211</sup> *Id.* at 446 (“[T]here have been and there will continue to be instances of discrimination against the retarded that are in fact invidious.”).

<sup>212</sup> *Id.* at 445–46.

<sup>213</sup> *Id.* at 448.

<sup>214</sup> *Id.* at 450.

<sup>215</sup> *Id.*

If we assume the Court will apply “rational basis” scrutiny to all disabilities, the Equal Protection Clause would be violated if a state engaged in either of two kinds of conduct toward persons with disabilities: (1) conduct disfavoring persons with disabilities that is motivated by “mere negative attitudes” about such persons, or by “vague, undifferentiated fears,”<sup>216</sup> and (2) conduct treating such persons differently from otherwise similarly situated groups when the differentiation is irrational and/or arbitrary.<sup>217</sup>

The first of these categories means that conduct that would be “rational” if motivated by a legitimate reason might nonetheless violate the Equal Protection Clause if the conduct is undertaken not for that reason but out of personal antipathy. For example, it might not violate the Constitution for a state to refuse to hire a wheelchair-bound person because it did not want to spend the \$200 that would be needed to build a ramp, but it would be a violation to refuse that hire if it was not the \$200, but rather discomfort with having to associate with a disabled person, that motivated the decision not to hire. Proffered explanations that are rational will not save state action if those explanations are mere pretexts for decisions made for impermissible reasons of animus.

#### B. *The Argument against the ADA as Fourteenth Amendment Legislation*

Perhaps the most important court of appeals decision holding that the ADA is not a proper enforcement of the Fourteenth Amendment—given the prominence of and widespread respect for its author—is Judge Frank Easterbrook’s decision for the Seventh Circuit in *Erickson v. Board of Governors*.<sup>218</sup> The *Erickson* decision declared that the invalidity of the ADA follows *a fortiori* from the Supreme Court’s

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<sup>216</sup> *Id.* at 448–49; see also *Romer v. Evans*, 517 U.S. 620, 635 (1996) (stating that laws must bear a rational relationship to a legitimate governmental purpose and that the Colorado Constitutional Amendment providing that gays and lesbians shall not have any particular protections from the law was not directed to any identifiable legitimate purpose or discrete objective).

<sup>217</sup> See *Romer*, 517 U.S. at 630 (stating that constitutionality hinged on whether the classification was arbitrary); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) (“[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 46 (1985); *Lindsey v. Normet*, 405 U.S. 56, 79 (1972) (holding that an Oregon statute violated the Equal Protection Clause because its discrimination against a certain class was “arbitrary and irrational”). Even conduct that disqualifies a single individual is unconstitutional if arbitrary. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).

<sup>218</sup> 207 F.3d 945 (2000). The court’s holding addressed only Title I of the ADA—the employment title.



decisions invalidating the RFRA and the ADEA, as it is even harder to fit the ADA into the Supreme Court's two-part test.<sup>219</sup>

The *Erickson* court thought that the ADA "prohibits very little conduct likely to be held unconstitutional."<sup>220</sup> The ADA's primary aim is to compel employers to accommodate the distinct needs of persons with disability—needs that exist precisely because such persons are different in ways that disable their ability to perform equally with others. Therefore, "[t]he ADA's main target is an employer's *rational* consideration of disabilities. Rational discrimination *by definition* does not violate a constitutional provision that condemns only irrational distinctions based on disabilities."<sup>221</sup>

The *Erickson* court went on: if reliance on a rational distinction is to be invalidated, there must be proof that it was not the real reason for the decision, but merely a pretext for a choice that was invidiously motivated. But the ADA does not require such proof.<sup>222</sup> Additionally, as Congress "did not find that states have adopted clever devices that conceal irrational discrimination,"<sup>223</sup> and the congressional record discloses no evidence of invidiously-motivated conduct by states, there was no justification for banning neutral practices as a "prophylactic" against concealed invidious motivation.<sup>224</sup>

This line of reasoning also constitutes the backbone of the argument in the brief for the state agencies in *Garrett*.<sup>225</sup> But their brief embellishes the argument with two additional points. First, the proliferation of *state* laws banning disability discrimination by the state itself strengthens the case against the ADA: it reflects that states are not invidiously motivated (if they were, they would not pass these laws), and it means that there was no need for Congress to apply the ADA to the states (for adequate remedies were already available under state law).<sup>226</sup> Second, Congress did not impose the same burdens on the federal government as it placed on the states.<sup>227</sup>

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<sup>219</sup> *Id.* at 949, 951.

<sup>220</sup> *Id.* at 949 (quoting *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 648 (2000) (to be published at 528 U.S. 62 (2000))).

<sup>221</sup> *Id.* (first emphasis added).

<sup>222</sup> *See id.* at 950.

<sup>223</sup> *Id.* at 951.

<sup>224</sup> *Id.* at 952. Judge Diane Woods, dissenting, would have upheld the ADA's Fourteenth Amendment pedigree, concluding that Congress did have evidence of a history of purposeful discrimination that justified the adoption of prophylactic measures. *Id.* at 957–58.

<sup>225</sup> *See* Brief for Petitioners, *Univ. of Ala. Bd. of Trs. v. Garrett* (U.S. argued Oct. 11, 2000) (No. 99-1240).

<sup>226</sup> *Erickson*, 207 F.3d at 33.

<sup>227</sup> *Id.* at 40. It is literally true that the ADA does not apply to the federal government. But the federal government was already under more sweeping constraints (including an obligation to take affirmative action) by virtue of section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C.

The adequacy of state laws as remedies and Congress's failure to apply the same rules to the federal government have no logical relevance to the Fourteenth Amendment provenance of a federal statute—the federal government is not targeted by the Fourteenth Amendment, and Congress's power to enforce that amendment surely is not subordinate to state law. But the choice by the state agencies' lawyers to invoke these factors suggests—perhaps accurately—that they think these considerations may “push the buttons” of Justices who regard the states as “sovereigns” whose dignity should be respected by Congress.<sup>228</sup>

### C. *The Strategic Choices Confronting Those Defending the ADA*

Before turning to the affirmative case for the Fourteenth Amendment grounding of the ADA, advanced in the briefs of the respondents and the United States, it is useful to describe two strategic choices that had to be made by these parties in shaping their briefs.

#### 1. *How Much of the ADA Is before the Court in University of Alabama Board of Trustees v. Garrett?*

What, exactly, is at issue before the Court in *Garrett*? Is it the Fourteenth Amendment grounding of the *entire* ADA or only of the employment provisions of the ADA? The ADA has a typical severability clause declaring that the unconstitutionality of one provision “shall not affect the enforceability of the remaining provisions of the chapter.”<sup>229</sup> Plaintiffs in these cases alleged only employment discrimination, but Title II of the ADA encompasses far more than employment. From a traditional “standing” perspective, as the plaintiffs have no litigation stake in the validity of the provisions of the ADA unrelated to employment, it would seem that this case properly presents the question of the constitutionality of

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§ 791(b) (1994), and implementing regulations, 29 C.F.R. §§ 1613.701–709 (1991). Furthermore, shortly after the passage of the ADA, Congress amended section 501 to declare expressly that the nondiscrimination obligations of the federal government included compliance with all the employment provisions of the ADA, in addition to the already-existing affirmative action obligations. See 29 U.S.C. § 791(g) (1994). The only real difference between the federal government and the states is at the remedy stage. Damages against the federal government, as against the states under Title I of the ADA, are subject to the monetary cap specified in the Civil Rights Amendments Act of 1991, 42 U.S.C. § 1981a (1994). But states are also subject to suit under Title II of the ADA where damages are not capped (albeit they cannot be awarded at all unless the plaintiff proves intentional discrimination).

<sup>228</sup> Of course, the claim that the existence of state laws proves that there is no remaining hostility to persons with disabilities is relevant to the Fourteenth Amendment, but as shown, *infra* notes 296–305 and accompanying text, the claim is incorrect.

<sup>229</sup> 42 U.S.C. § 12213 (1994).

the ADA only as it relates to employment, i.e., all of Title I but only so much of Title II as applies to employment.

But the “question presented,” as framed by the petitioners (the state agencies) is, “[d]o Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, exceed Congress’s enforcement authority under Section 5 of the Fourteenth Amendment?”<sup>230</sup> What is more, when the case was pending on petition for certiorari, the parties (petitioners, respondents, and the United States) all joined a stipulation advising the Court that this case was the best vehicle (of the cases then pending on petitions for certiorari) for addressing the issues because this case involved both Titles I and II and thus afforded the Court an opportunity to address the Fourteenth Amendment grounding of both.<sup>231</sup>

The brief for the petitioners (the state agencies) challenges Titles I and II in their entirety, as do the handful of amici curiae briefs supporting the petitioners.<sup>232</sup> Indeed, much of the attention of these briefs is focused on provisions of the ADA wholly unrelated to employment.

The principal responsive briefs—those of the respondents and of the United States—took opposite tactics in defining the scope of the litigation. Respondents advised the Court that they were defending only the employment provisions of the ADA, as only those are logically at issue here, given the ADA’s severability clause and the plaintiffs’ invocation of only the employment provisions. They took this position not because they thought the rest of Title II indefensible—indeed, they assured the Court that they *are* defensible—but for two practical reasons.

First, the Fourteenth Amendment justifications for many of the provisions unrelated to employment—deinstitutionalization, removal of architectural barriers, ends to discrimination in prisons, etc.—are different from the justifications for the employment provisions. As an example, the Fourteenth Amendment justification for the ADA provision construed in *Olmstead v. L.C.*<sup>233</sup>—the requirement that mental health services be provided in the most integrated setting consistent with the patient’s needs—consists mainly of the need to avoid perpetuating past discrimination. States overbuilt mental institutions during the early part of the twentieth century, when there was a deliberate goal of segregating persons with mental disabilities from the rest of

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<sup>230</sup> Brief for Petitioners at i, *Garrett* (No. 99-1240).

<sup>231</sup> Stipulation, *Univ. of Ala. Bd. of Trs. v. Garrett* (U.S. argued Oct. 11, 2000) (No. 99-1240).

<sup>232</sup> An amicus brief supporting petitioners (the state agencies) was filed by seven states. *See supra* note 18. Also, amicus briefs supporting the petitioners were filed by the Coalition for Local Sovereignty, the Pacific Legal Foundation, and the Criminal Justice Legal Foundation. There were sixteen amicus briefs supporting respondents. In addition to those of President Bush and the congressional sponsors of the ADA, briefs supporting respondents were filed by the American Bar Association, law professors, historians, and a number of disability rights organizations.

<sup>233</sup> 527 U.S. 581 (1999).

society. Even if that segregative goal is no longer animating state decisionmaking,<sup>234</sup> the existence of these massive institutions has led to communities heavily dependent on the jobs and patronage that flow from their continued operation. Political resistance to downsizing these institutions, if motivated by these economic considerations, would not be invidious, but it would be a perpetuated effect of the invidiously-motivated decision to create these oversized institutions in the first place.

Each of the ADA's myriad applications addresses a different historic problem and has a distinctive Fourteenth Amendment justification. Respondents had enough trouble squeezing their defense of the *employment* provisions into the allotted fifty page brief limit, without undertaking a canvas of the entire ADA terrain.

The other reason that prompted counsel for respondents to limit their focus to the employment provisions is their assumption that even if respondents win, the Court on its own will limit its holding to employment. The Justices on the present Court tend to be cautious and rarely decide more than is necessary to dispose of the case before them. Given the diversity of provisions in the ADA, and the breadth of the landscape covered by those provisions collectively, it is unlikely that five Justices will coalesce in a decision in an employment case that upholds the Fourteenth Amendment grounding of provisions wholly unrelated to employment. If "employment alone" is the most that can be hoped for as a victory, then prudence suggests limiting the case to that, both so that the employment provisions are not jeopardized by judicial nervousness about the most expansive of the ADA's provisions, and, conversely, so that if *Garrett* takes down the employment provisions, it does not take down other provisions of the ADA that have different justifications, such as the "most integrated setting" provision.

The Solicitor General, on the other hand, has elected to defend the entirety of the ADA in the brief for the United States. This no doubt reflects the somewhat different interests of the United States (the Department of Justice administers the entirety of Title II and would avoid years of future litigation if it could get the entire ADA validated at one swoop). It may also reflect a reluctance on the part of the Solicitor General's office, which plays a dual role as advocate and "officer of the court," not to appear to be welching on a stipulation with which the grant of certiorari was induced.<sup>235</sup>

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<sup>234</sup> A proposition that is debatable: as *Cleburne* demonstrated, there is still a "not in my backyard" resistance to allowing group homes for the mentally retarded in the community. See generally *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>235</sup> Counsel for respondents are not similarly constrained, as their lack of "standing" to litigate about the rest of the ADA means that they are dutiful to the Court's own standing constraints. This excuse for acting inconsistently with the stipulation was not available to the United States, which of course does have a stake in the entirety of the ADA.

## 2. Should Respondents Argue that Disability Merits Heightened Scrutiny?

The second delicate strategic choice respondents had to make was whether to accept the premise of both Judge Easterbrook and the petitioners' brief—that classifications based on disability do not receive heightened scrutiny and thus trigger only rational basis review—or to affirmatively argue that the Court should hold that disability classifications *are* subject to heightened scrutiny. It is widely believed among lawyers that *Cleburne* settled the issue, by holding that mental retardation does not receive heightened scrutiny. But the current status of Supreme Court decisional law is actually muddier than generally recognized.

First, it is unsettled whether claims of disability discrimination are governed by rational-basis scrutiny or by heightened scrutiny.<sup>236</sup> Second, even if the label "rational basis" is retained to describe the review accorded disability classifications, there is reason to think that in practice the review will be more rigorous (and more likely to trigger findings of denials of equal protection) than is true generally of categories subjected to rational-basis review. As Justice Marshall demonstrated in his concurrence in *Cleburne*, the majority's reasons for invalidating the zoning ordinance in that case reflected a much more searching scrutiny of the proffered rationales for the ordinance than is customary when the Court is evaluating traditional economic legislation under the rational-basis standard.<sup>237</sup> Moreover, the two Justices whose votes were necessary to make an opinion for the Court in *Cleburne*, wrote separately to state that they had joined that opinion only because they understood the Court to be embracing a rational basis test that required balancing the justification for the disability classification against the degree of injury it would inflict.<sup>238</sup> The Court appears to have done the same with respect to classifications based on sexual orientation, declaring that such classifications receive only rational basis review but implementing that standard with a balancing test.<sup>239</sup> This balancing test goes far beyond traditional rational-basis review (which legitimates the classification so long as there is *anything* on the state's side of the scale, irrespective of what there might

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<sup>236</sup> See *Heller v. Doe*, 509 U.S. 312, 335 n.1, 336–37 (1993) (Souter, J., dissenting) (stating that the Court declined to decide whether *Cleburne* remains the standard for mental retardation, perhaps because of Congress's intervening factual findings in the ADA); *Schweiker v. Wilson*, 450 U.S. 221, 231 n.13 (1981) ("We therefore intimate no view as to what standard of review applies to legislation expressly classifying the mentally ill as a discrete group.").

<sup>237</sup> *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring).

<sup>238</sup> *Id.* at 452 n.4 (Stevens, J., concurring, joined by Burger, C.J.).

<sup>239</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("Amendment 2 . . . inflicts on [gays and lesbians] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.").

be on the other). A review of disability classifications that requires “balancing” would make the Fourteenth Amendment justification for the ADA’s reasonable accommodation provision much clearer, for that provision itself requires just such a balance—the need for accommodation against hardship to the employer.

While counsel for respondents believed in the correctness of these avenues of escape from the “rational basis” box that sank the ADEA and that Judge Easterbrook used to sink the ADA, they believed as well that these are “hard sells” to any of the five Justices in the current majority. As a result, counsel opted for a straddle. The brief for respondents argues that even if traditional rational-basis review applies, the ADA is still a proper exercise of Congress’s power under Section 5 of the Fourteenth Amendment.<sup>240</sup> But in a footnote the brief states that if the Court does not agree, it will have to address and resolve these uncertainties about the state of the law before it can conclude that the ADA is unconstitutional.<sup>241</sup>

### *3. The Case for Upholding the ADA’s Employment Provisions as an Appropriate Exercise of Congress’s Fourteenth Amendment Power*

For respondents to prevail in *Garrett*, they must clear the two hurdles erected by the Supreme Court’s recent decisions. They must establish: (1) that the ADA was addressing a serious problem of disability discrimination *violative of the Constitution*, and (2) that the employment provisions of the ADA—insofar as they go beyond forbidding merely what the Fourteenth Amendment forbids—are a congruent and proportional response to that problem.

#### *a. Hurdle Number One: Is There A Serious Problem of State Behavior Violative of the Fourteenth Amendment?*

While the brief for petitioners in *Garrett* focuses on, and attempts to negate, the applicability of the “irrational and arbitrary” branch of the Equal Protection Clause jurisprudence, that brief ignores the other branch, the branch that holds that invidiously-motivated actions violate equal protection. It is the latter that fuels the briefs for respondents and the United States.

In *Kimel*, the Court rejected the employee’s contention that widespread invidious discrimination against the aged provided Congress an appropriate basis for exercising its Section 5 power.<sup>242</sup> The Court insisted that there is no animus in our society toward the aged: each of us aspires to join their ranks. There is no we/they operative.

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<sup>240</sup> Brief for Respondents at 38–39, *Univ. of Ala. Bd. of Trs. v. Garrett* (U.S. argued Oct. 11, 2000) (No. 99-1240).

<sup>241</sup> Brief for Respondents at 16 n.18, *Garrett* (No. 99-1240).

<sup>242</sup> *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 650 (2000) (to be published at 528 U.S. 62 (2000)).

Congress enacted the ADEA not to combat irrational hostility toward the aged, but to outlaw certain forms of economically rational employer behavior. Because mental and physical agility do decline with age, it is economically rational for employers to force out (or not hire) persons of advanced age. Of course, some of those persons will have suffered no decline in agility, but to sort them out via individualized determinations would be expensive and not wholly reliable. So, many employers, including states, make the economically rational choice to overgeneralize and to use age as a proxy for declining agility. When they do, they are not denying equal protection.<sup>243</sup>

The Court had already held three times before *Kimel* that employment standards based on generalizations about age, because economically rational, do not violate the Equal Protection Clause.<sup>244</sup> These standards could not, therefore, be a predicate for Congress's exercise of its Fourteenth Amendment power.<sup>245</sup> True, Congress was free, in the exercise of its Commerce Clause power, to deprive employers, including states, of this economically rational selection device. But Congress was not free to authorize individual lawsuits against states to enforce this requirement, as the Eleventh Amendment bars private suits to enforce obligations imposed pursuant to Congress's Commerce power.<sup>246</sup>

The key, then, to the holding in *Kimel* was the Court's conclusion that the aged do not experience invidious discrimination, i.e., discrimination motivated by prejudice rather than economic rationality.<sup>247</sup> The Court doubted that there is irrational or invidious age prejudice anywhere in our society, but at all odds there was no evidence before Congress that such poisonous attitudes motivated state behavior, and Congress did not purport to find otherwise. Instead, Congress attached the label "discrimination" to the economically rational use of generalizations, which does not violate the Fourteenth Amendment.<sup>248</sup>

This is where the ADA parts company with the ADEA and where the effort to use *Kimel* to invalidate the ADA fails. For in enacting the ADA, Congress determined that the root cause of discrimination against persons with disabilities is invidious prejudice, and Congress found pervasive employment discrimination against persons with disabilities resulting from that prejudice.

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<sup>243</sup> *Id.* at 646.

<sup>244</sup> See *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (per curiam).

<sup>245</sup> *Kimel*, 120 S. Ct. at 645.

<sup>246</sup> *Id.* at 643.

<sup>247</sup> *Id.* at 645.

<sup>248</sup> *Id.* at 649–50.

i. *The Root Causes of Discrimination against  
Persons with Disabilities*

In the "findings" recited in § 12101 of the ADA, Congress stated that the isolation and segregation of persons with disabilities "continue[s] to be a serious and pervasive social problem"<sup>249</sup> and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis."<sup>250</sup> These findings were amplified in the committee reports on the ADA. Disability discrimination is "based on false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies."<sup>251</sup> "Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased cost and decreased productivity"; thus, the legislation was designed "to provide a high degree of protection to eliminate [this] current pervasive bias."<sup>252</sup> These findings paralleled the Supreme Court's observation in *School Board v. Arline*, cited in the committee reports, that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."<sup>253</sup> Congress recognized that these large engines of

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<sup>249</sup> 42 U.S.C. § 12101(a)(2) (1994).

<sup>250</sup> § 12101(a)(9).

<sup>251</sup> S. REP. NO. 101-116, at 7 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267.

<sup>252</sup> *Id.* at 37. *Accord* H.R. REP. NO. 101-485, pt. 2, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 (showing that the legislation was aimed at "stereotypical assumptions, fears and myths"); *id.* at 71 (explaining that the ADA was to "eliminate the pervasive bias"); *id.* at 75 (showing that at the time of the enactment there "still exist[ed] widespread irrational prejudice"); H.R. REP. NO. 101-485, pt. 3, at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 (explaining the "stereotypes, discomfort, [and] misconceptions" surrounding those with disabilities).

<sup>253</sup> *Sch. Bd. v. Arline*, 480 U.S. 273, 284 (1987); H.R. REP. NO. 101-485, pt. 2, at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303; S. REP. NO. 101-116, at 24 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267. *See also* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL 20 (Apr. 1989) [hereinafter ACIR REPORT]:

Probably the most significant barriers faced by persons with disabilities relate to the attitudes, predispositions, and behaviors of nondisabled persons. Such attitudes range from negative views of disability to discomfort in associating with people who experience some form of disability. The nature and extent of attitudes about disability have been documented through an extensive set of research studies conducted in many settings. One common finding is that nonhandicapped people tend to be preoccupied with disabling conditions and often are incapable of seeing beyond these conditions to the whole person. . . . Such predispositions lead nondisabled persons to overlook or ignore the full range of abilities of persons with disabilities.



prejudice had generated an immense and intractable disability discrimination problem.

Congress's findings as to the root causes of disability discrimination rested on a firm evidentiary base. Congress relied heavily on a report prepared by the U.S. Commission on Civil Rights, *Accommodating the Spectrum*.<sup>254</sup> That report, drawing on extensive professional literature, detailed four "major types" of "prejudice" that persons with disabilities encounter.<sup>255</sup> Governmental action disadvantaging persons with disabilities that is animated by any of these four violates the Equal Protection Clause.

(a) *Discomfort/Aversion*: "Psychological studies indicate that interaction with handicapped people, particularly those with visible handicaps, commonly produces feelings of discomfort and embarrassment in nonhandicapped people. . . . [H]andicapped people encounter the reaction of aversion every day"—a reaction rooted in repulsion, fear, and embarrassment at interacting with such persons.<sup>256</sup> Adverse governmental actions against persons with disabilities motivated by these feelings violate the Equal Protection Clause, as the Court held in *Cleburne*.<sup>257</sup>

(b) *Stigmatization*: "A handicapping condition is frequently, albeit illogically, viewed as a blameworthy characteristic or a badge of disgrace," and one who possesses that condition is seen "as not quite human."<sup>258</sup> "The professional literature is full of discussions about the stigma associated with handicaps,"<sup>259</sup> which is a stigma that in some instances stems from "biblical references that seem to link handicaps with sin, death, demons, and punishment" and in others from the "aesthetic . . . high value our society places on physique, athletic prowess, beauty, and intelligence."<sup>260</sup> As Congress noted, "our society is *still* infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully

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<sup>254</sup> U.S. COMMISSION ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* (1983) [hereinafter *SPECTRUM*]; S. REP. NO. 101-116, at 6 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267; H.R. REP. NO. 101-485, pt. 2, at 28 (1989), *reprinted in* 1990 U.S.C.C.A.N. 303.

<sup>255</sup> *SPECTRUM*, *supra* note 254, at 23-27.

<sup>256</sup> *Id.* at 23.

<sup>257</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-49 (1985). *See also* *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (noting that a state may not "fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different"); *Watson v. Memphis*, 373 U.S. 526 (1963) (holding that public discomfort with a minority's perceived differences is an unconstitutional ground for state action).

<sup>258</sup> *SPECTRUM*, *supra* note 254, at 26.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 26 n.66. *See also* ACIR REPORT, *supra* note 253, at 20.

human.”<sup>261</sup> Governmental action motivated by these negative, stigmatizing attitudes is at the very core of what the Fourteenth Amendment forbids.<sup>262</sup>

(c) **Stereotyping:** Congress found that it was “strikingly clear” from the evidence it received at the ADA hearings that “stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today.”<sup>263</sup> Many of the widely-held stereotypes about persons with disabilities are simply myths, such as the ones that epilepsy and cancer are contagious, cited in *Arline*, and the one that the HIV virus is transmittable by casual contact.

Other common disability stereotypes consist of false generalizations attributing negative characteristics to persons with disabilities as a class, when in fact those characteristics are no more prevalent among that class than among the population at large. The Senate report addressed the false “group based fears” phenomenon by describing a 1973 study that had “examined the job performance, safety record and attendance of 1,452 physically impaired employees of E.I. duPont de Nemours and Company” in order to “determine the validity of several concerns expressed by employers with regard to hiring veterans with disabilities.”<sup>264</sup> The duPont study found that, as to each of these concerns, the disabled workers performed as well as or better than their nondisabled coworkers.<sup>265</sup>

Nonetheless, as the ACIR found seventeen years later, employment discrimination against persons with disabilities based on “false stereotypes” persisted in the public sector.<sup>266</sup> The Report explained:

The reluctance of employers to hire persons with disabilities is rooted in common myths and misunderstandings, including the notions that the employment of disabled workers will increase insurance and worker compensation costs, lead to higher absenteeism, harm efficiency and productivity, and require expensive accommodations.

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<sup>261</sup> S. REP. NO. 101-116, at 8–9 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267 (quoting Justin Dart). For an example of just how much “less than human,” see *id.* at 7 (detailing that a zookeeper barred children with Downs Syndrome because he feared they would frighten the chimpanzees).

<sup>262</sup> *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 n.40 (1979) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)); *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885).

<sup>263</sup> S. REP. NO. 101-116, at 37 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267.

<sup>264</sup> *Id.* at 28–29.

<sup>265</sup> *Id.* Some specific findings of the study were as follows: Ninety-one percent of DuPont’s disabled workers rated average or better in performance. S. REP. NO. 101-116, at 29 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267. Only four percent of the workers with disabilities were below average in safety records; more than half were above average. *Id.* Ninety-three percent of the workers with disabilities rated average or better with regard to job stability (turnover rate). *Id.* Seventy-nine percent of the workers with disabilities rated average or better in attendance. *Id.*

<sup>266</sup> ACIR REPORT, *supra* note 253, at 72–73.

... These attitudes, common to many employers in the United States, have persisted despite empirical evidence from several quarters that disabled workers perform at levels equal to or superior to other employees.<sup>267</sup>

Denying persons with disabilities equal access to the workplace on the basis of myths or false generalizations plainly violates the Equal Protection Clause.<sup>268</sup> Indeed, as Justice Kennedy pointed out in *Olmstead*, “[u]nderlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa. Of course, the line between animus and stereotype is often indistinct.”<sup>269</sup> Furthermore, adverse action based on either violates the Equal Protection Clause.

Nothing said by the Court in *Kimel* is to the contrary. The Court there addressed a conceptually different kind of generalization—one that, while not true of every individual in the class or group, is recognized as being true on average, viz, that older workers on average would be less productive than younger workers on average.<sup>270</sup> Additionally, the Court dealt there with a class (older persons), which the Court concluded had not been subject to a “history of purposeful unequal treatment.”<sup>271</sup> Nothing in *Kimel* remotely suggests that action taken in reliance on a myth or on a stereotype that wrongly attributes to a historically disfavored class a characteristic no truer of that class than of the public at large has a rational basis. Of course, *Cleburne* belies just that proposition, as does *United States v. Virginia*.<sup>272</sup>

(d) **Paternalism:** Often, persons with disabilities suffer from actions that “spare” them the “rigors” of ordinary life that, in fact, they earnestly desire to confront and

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<sup>267</sup> *Id.* at 21.

<sup>268</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449 (1985). The Court found that the zoning ordinance, which excluded group homes for persons with mental retardation, was violative of the Equal Protection Clause. This is because the ordinance was predicated on the city’s belief that persons with mental retardation create a “special hazard,” disturb the “serenity of the neighborhood,” and pose “danger to others,” yet fraternity houses and college dormitories that pose similar dangers were allowed—“it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.” *Id.* See also *Olmstead v. L.C.*, 527 U.S. 581, 612 (1999) (Kennedy, J., concurring) (indicating that treating persons with disabilities differently from the public generally “without adequate justification” is discrimination).

<sup>269</sup> *Olmstead*, 527 U.S. at 611.

<sup>270</sup> *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 646 (2000) (to be published at 528 U.S. 62 (2000)).

<sup>271</sup> *Id.* at 645 (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, (1973))). In that context, the Court held that action in reliance on such a generalization has a rational basis. *Kimel*, 120 S. Ct. at 646–47.

<sup>272</sup> *United States v. Virginia*, 518 U.S. 515, 541–42 (1996) (use of overbroad generalizations that tend to perpetuate historical stereotypes about a disfavored class violates the Equal Protection Clause).

that they are fully capable of handling.<sup>273</sup> Congress concluded from its ADA hearings that "[i]t is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant [for employment]."<sup>274</sup>

However "well-intentioned," such paternalism is another form of unconstitutional discrimination. "Traditionally, [unconstitutional gender] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>275</sup>

## ii. *State Employment Discrimination Resulting from Prejudice Against Persons with Disabilities*

A congressionally-created agency, the Advisory Commission on Intergovernmental Relations (ACIR)<sup>276</sup>—a majority of whose members were state and local governmental officials<sup>277</sup>—published and distributed to each member of Congress,<sup>278</sup> while the ADA was under consideration, a report addressing, inter alia, why so few persons with disabilities were employed by the states.<sup>279</sup> The report described the results of a survey the commission conducted of "officials in state

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<sup>273</sup> See SPECTRUM, *supra* note 254, at 24.

<sup>274</sup> S. REP. NO. 101-116, at 38 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267.

<sup>275</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion); *see also United States v. Virginia*, 518 U.S. at 538, 549–50, n.20. Cf. STAFF OF THE HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1640, n.7 (Comm. Print 1990) (citation omitted) (witness cited a study, which found "a positive relationship . . . between tendencies to pity blind people on the one hand, and the tendency to espouse community segregation for the blind on the other").

<sup>276</sup> The ACIR was created as a permanent, bipartisan commission to give continuing study to the relationship among local, state, and national levels of government. Advisory Committee on Intergovernmental Relations Act of 1959, Pub. L. No. 86-380, 73 Stat. 703 (codified at 42 U.S.C. § 4272 (1994)). Among its statutory functions was to "make available technical assistance to the executive and legislative branches of the Federal Government in the review of proposed legislation to determine its overall effect on the Federal system." § 4272

<sup>277</sup> The Commission had twenty members at the time this report was published: two governors, three members of state legislatures, three mayors, three county officials, six members of Congress (three from each house), the U.S. Attorney General, and two private citizens. ACIR REPORT, *supra* note 253, at inside front cover.

<sup>278</sup> A letter from the former Executive Director of the ADA, appended to the Brief for Respondents in *Garrett*, reports that the ACIR report was sent "to all the elected members of the United States Congress in May 1989." Even before the report was published, the central finding contained in the draft of the ACIR Report was described in testimony to Congress. STAFF OF THE HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1614 (Comm. Print 1990).

<sup>279</sup> See ACIR REPORT, *supra* note 253.

agencies.”<sup>280</sup> A large percentage (82.7%) of the state officials polled declared that “negative attitudes” or “misconceptions by employers about the work capabilities of persons with disabilities” had either a “strong” or “moderate” impact on state employment of persons with disabilities.<sup>281</sup>

In addition, ACIR invited state officials to provide narratives stating what they thought was impeding the states’ employment of more persons with disabilities:

State . . . public officials . . . reiterated the significant and often negative impact of public and employer attitudes toward persons with disabilities. Such attitudes have multiple dimensions, including feelings of discomfort in associating with disabled individuals, [and] inaccurate assessments of their productivity. . . . [State officials] expressed strong distress at the prominence of these attitudes and the difficulty in changing them.<sup>282</sup>

Other studies before Congress reached similar conclusions. In 1969, A study commissioned by the U.S. Department of Labor had reported:

In general, observations made during the field research suggested that job opportunities for the handicapped were even more circumscribed in the public than in the private sector. . . . While state and local governments are becoming increasingly important as employers, their policies on hiring the handicapped are not improving accordingly. . . . [M]any have rigid physical examination requirements which may be quite irrelevant to the demands of the jobs in question. . . . These requirements appear to be based on outmoded assumptions about the capacities of the handicapped and also on the belief that there are widespread aversions to visible handicaps which would lower public confidence in the employee.<sup>283</sup>

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.*, at 72–73, 120 (showing the following statistics: 34.7% said “strong,” 48.0% “moderate,” 10.7% “weak,” and 2.0% “none”).

<sup>282</sup> *Id.* at 73.

<sup>283</sup> GREENLEIGH ASSOC., INC., A STUDY TO DEVELOP A MODEL FOR EMPLOYMENT SERVICES FOR THE HANDICAPPED 121–22 (1969) [hereinafter GREENLEIGH STUDY], cited in STAFF OF THE HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1640, 1621–22 (Comm. Print 1990) (testimony to Congress). A 1972 study by the Texas Rehabilitation Committee made similar findings with respect to state employment in Texas. TEX. REHAB. COMMISSION, EXCERPTS & RECOMMENDATIONS FROM THE WORKPLACE FOR PLACEMENT OF THE HANDICAPPED IN STATE GOVERNMENT SERVICE 1–5 (1972) [hereinafter TEXAS REPORT]. The report found, *inter alia*, that “front-line supervisors” had “qualms” about working with persons with disabilities, and there was a “social stigma” that deterred hiring of such persons. Additionally, an in-depth study of state employment in New York after enactment of the ADA showed that these problems have persisted even after the ADA’s enactment. SHARON L. HARLAN & PAMELA M. ROBERT, DISABILITY IN WORK ORGANIZATIONS: BARRIER TO EMPLOYMENT OPPORTUNITY, FINAL REPORT xiii (1995) (finding that persons with disabilities seeking employment with the state “confront stereotypes, ignorance,

Congress was advised of a study of twenty-three public jurisdictions showing, inter alia, that none was willing to hire blind applicants, that many excluded applicants with a history of cancer, and that one even had a written standard prohibiting the hiring of an amputee for any job unless he or she made use of a prosthesis, even though it might not be required for success on the job.<sup>284</sup> Still another study, conducted by the American Cancer Society, found that most government agencies in California discriminated in hiring of applicants for an average of five years after treatment for cancer.<sup>285</sup> On the basis of this and other sources, Congress found that "there still exists widespread irrational prejudice against persons with cancer."<sup>286</sup> Congress also took note of the 1989 report of President Bush's Commission on the HIV Epidemic on the need for legal constraints to prevent discrimination against persons with symptomatic and asymptomatic HIV infection.<sup>287</sup>

Witnesses at hearings on the ADA recounted numerous instances of exclusion of persons with disabilities from public employment based on aversion and irrational fear. The committee reports note "a case in which a woman 'crippled by arthritis' was denied a job, not because she could not do the work but because 'college trustees [thought] normal students shouldn't see her,'"<sup>288</sup> and another in which a person was denied a public school teacher job because she was in a wheelchair.<sup>289</sup> Congress

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misinformation, fear and pity that impede progress toward equal opportunity").

<sup>284</sup> *Civil Rights Restoration Act of 1987: Hearing on S. 557 Before the Senate Comm. on Labor and Human Res.*, 100th Cong. 80 (1988).

<sup>285</sup> STAFF OF THE HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1619 (Comm. Print 1990).

<sup>286</sup> S. REP. NO. 101-116, at 39-40 (1989), reprinted in 1990 U.S.C.C.A.N. 267. See also the Supreme Court's observation in *School Board v. Arline*, a public employment disability discrimination case, that "[e]ven those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they may be contagious." 480 U.S. 273, 284 (1987) (footnote omitted); Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMPLE L. Q. 1, 2-9 (1986) (describing reasons for employment discrimination against persons with cancer histories and finding that such discrimination exists in both public and private employment).

<sup>287</sup> S. REP. NO. 101-116, at 19 (1989), reprinted in 1990 U.S.C.C.A.N. 267. A member of the National Commission on AIDS testified to Congress, "remember, Ryan White, denied entry to school. The Ray family, burned from their home. A woman with AIDs denied entry with her children to a public swimming pool. A bright young attorney . . . fired from his job." STAFF OF THE HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 3 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1995 (Comm. Print 1990). See also *Cain v. Hyatt*, 734 F. Supp. 671, 680 (E.D. Pa. 1990) (noting that HIV positive individuals are "widely stereotyped as indelibly miasmic, untouchable, physically and morally polluted").

<sup>288</sup> S. REP. NO. 101-116, at 7 (1989), reprinted in 1990 U.S.C.C.A.N. 267; H.R. REP. NO. 101-485, pt. 2, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 303.

<sup>289</sup> S. REP. NO. 101-116, at 7; H.R. REP. NO. 101-485, pt. 2, at 30.

heard testimony that a professor of veterinary medicine at a state university was fired when it was discovered that he had AIDS.<sup>290</sup> Senator Durenberger told of a highly qualified applicant who was turned down for a job at the Metropolitan Twin Cities Hospital because "her fellow employees would not be comfortable working with a person as disabled as [she was]."<sup>291</sup> Still additional instances were cited in a report of the U.S. Commission on Civil Rights.<sup>292</sup>

Congressman Major Owens, who chaired a subcommittee considering the ADA, appointed a Task Force on the Rights and Empowerment of Americans with Disabilities, which conducted sixty-three public forums and compiled a massive documentary file of personal accounts of disability discrimination.<sup>293</sup> A number of the accounts describe instances of discriminatory conduct in state and local government employment.<sup>294</sup> Numerous additional instances of invidious

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<sup>290</sup> *Americans with Disabilities Act: Hearing on S. 933 Before the Senate Comm. on Labor and Human Resources*, 101st Cong. 404 (1989) (testimony of National Organizations Responding to AIDS).

<sup>291</sup> 136 CONG. REC. 17,368 (1987).

<sup>292</sup> See Spectrum, *supra* note 254, at 21 (explaining that an Alabama National Guard officer was terminated with no benefits when it was learned that he had been diagnosed with depression and anxiety some twenty-five years earlier); *id.* (showing that a laborer employed by State Conservation Corps. was subjected to workplace harassment and public ridicule by superior because of his mental retardation); *id.* at 22 (explaining that a city bus driver was subjected to supervisory harassment, ridicule, and pressure to resign because of mental illness).

<sup>293</sup> STAFF OF THE HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1324-25 (Comm. Print 1990). The documentary file is now in the possession of the President's Committee on Employment of People with Disabilities. JONATHAN M. YOUNG, NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 211 (1997). The documents are indexed at the President's Committee in folders by state and by numbers within each folder. The citations *infra* note 294 identify the state and the number of the cited document within that state's folder.

<sup>294</sup> STAFF OF PRESIDENT'S COMM. ON PEOPLE WITH DISABILITIES, 101st CONG., TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES (1989). A health administrator walked into a job interview with a department head at the University of North Carolina, who immediately said, "Ah—if I knew you were blind I wouldn't have bothered bringing you in for an interview." *Id.* at N.C. 173. A student at a state university was denied the ability to student teach and thus earn his teaching certificate because "[t]he Dean of the School of Education at that time and his successor were convinced that blind people could not teach in public schools." *Id.* at S.D. 57. An employee of the Kansas Department of Transportation was fired "for the stated reason that I have epilepsy" despite exceeding the department's daily output requirement. *Id.* at Kan. 3. "Deaf workers at the University of Oklahoma are being paid a lower salary than their hearing workers and are required to perform the same work." *Id.* at Okla. 26. The State of Indiana's personnel office informed a woman with a hidden disability that she should not disclose her disability if she wanted to obtain employment. *Id.* at Ind. 7. A state college administrator who was blind prevailed on a disability discrimination claim when he was not rehired despite positive

discrimination in public employment were described in published lower court decisions predating the ADA.<sup>295</sup>

The state agency petitioners in *Garrett* argued in their brief that because most states had laws forbidding disability discrimination by the state at the time the ADA

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evaluations. *Id.* at Mass. 9. Despite having a higher score for training and experience than the sighted person who was hired, a blind applicant was denied the position of Director of State Services for the Blind. *Id.* at Minn. 13. A school teacher was denied a permanent position because she wears braces and walks with canes. *Id.* at Miss. 33. A lifeguard who worked for three summers at a city pool was denied a permanent job because he had epilepsy, even though he had not had a seizure since childhood. *Id.* at Ga. 4. A job seeker looking for a position with a public library was told, "they had already hired someone with a disability and they had met their quota." *Id.* at Wis. 55. A municipality initially told a summer job applicant that he would not be interviewed because he was in a wheelchair and then gave him a different interview than other applicants. *Id.* at Ark. 30. A blind teacher repeatedly has been told that she is not qualified for a position because the school needs a football coach; "In each case, a sighted person, who does not coach football, ha[d] been hired." *Id.* at Utah 75. A teacher's aide with a visual impairment was told "point blank that the reason I wasn't hired to work with children was because of the way my eyes were, that the children would, 'try to imitate me.'" *Id.* at Ill. 151. One writer summed up his experience, "rather than relate one specific example, as a state employee I daily see covert discrimination in hiring or not hiring people with disabilities with no reason given specifically." *Id.* at S.D. 46.

<sup>295</sup> *Chalk v. U.S. Cent. Dist. Ct. of Cal.*, 840 F.2d 701, 711 (9th Cir. 1988) (reversing denial of injunction sought by teacher with AIDS who was excluded from classroom teaching and noting that "[t]o allow the court to base its decision on the fear and apprehension of others would frustrate the goals of section 504"); *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981) (upholding injunction granting doctor with multiple sclerosis admission to psychiatry residency program and noting that the Chairman of the Department stated that "Dr. Pushkin 'is teachable, but to face the devastation, guilt, pity, and rage that can be stirred up in his patients by his physical condition appears to be too much to ask of his patients or of him'"). See also generally *Recanzone v. Washoe County Sch. Dist.*, 696 F. Supp. 1372 (D. Nev. 1988) (showing that a highly praised substitute teacher with no right hand, a left hand with three digits, and a speech impediment prevailed on a discrimination claim that she was denied a permanent contract while less qualified, nondisabled candidates were granted such contracts); *Fiesel v. Bd. of Educ.*, 490 F. Supp. 363 (E.D.N.Y. 1980), *aff'd* at 675 F.2d 522 (2d Cir. 1982). A teacher with spina bifida alleged that she initially had been denied a teaching license on the basis of a finding that she was physically "not fit" and thus was entitled to additional seniority. The case was dismissed on statute of limitations grounds. *Id.* See also *Gurmankin v. Costanzo*, 411 F. Supp. 982, 987-88 (E.D. Pa. 1976) (holding unconstitutional school district's initial policy of totally excluding blind persons as teachers). The court also found that the teacher's evaluation was based "on misconceptions and stereotypes about the blind and on assumptions that the blind simply cannot perform." *Id.*, *aff'd*, 556 F.2d 184 (3d Cir. 1977). Federal employment is also not immune to disability discrimination. See *Fowler v. United States*, 633 F.2d 1258, 1263 (8th Cir. 1980) (explaining that the federal government showed no rational basis for denying a termination hearing to a worker with mental retardation, while providing hearings to those without such a disability); *Smith v. Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (noting that federal employee with paraplegia who had a master's degree was assigned menial clerical tasks because her supervisor made "an arbitrary and unfounded decision as to her physical capabilities"), *modified*, 559 F.2d 1014 (5th Cir. 1977).



was enacted, it was evident that states did not harbor the invidious motivation that would be necessary to render otherwise rational state behavior a violation of the Equal Protection clause.<sup>296</sup> Congress was aware of those laws. But Congress embraced the assessment of the “fifty State Governors’ committees . . . who report[ed] that existing state laws do not adequately counter such acts of discrimination.”<sup>297</sup> Indeed, a 1986 study of state laws found that only eight states had substantive provisions as protective as section 504 of the federal Rehabilitation Act (the precursor to the ADA).<sup>298</sup> Congress also concluded, from the massive evidence of continuing disability discrimination, that the Rehabilitation Act “is also inadequate.”<sup>299</sup>

Congress concluded that prophylactics against pretextual decisionmaking are required if discrimination that is invidiously motivated is to be rooted out;<sup>300</sup> such prophylactics are provided in the employment provisions of the ADA.<sup>301</sup> But many state laws did not contain any such prophylactic and virtually none contained the range provided in the ADA.<sup>302</sup>

In any event, the enactment of state laws banning disability discrimination did not wash away all the state actor hostility toward persons with disabilities. These laws, whatever their insufficiencies, do, of course, suggest that state *legislators* are not hostile to persons with disabilities. But most disability discrimination comes, as in the two cases consolidated in *Garrett*, from *ad hoc* decisions made by individual personnel officers and supervisors—state actors who are functioning outside the public spotlight, without accountability, without the need to secure the concurrence of other decisionmakers, and without a detailed record of what has motivated their decisions. As the ACIR learned *from state officials*, the “negative attitudes” and “stereotypes and misconceptions” that are at the root of state employment

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<sup>296</sup> Brief for Petitioners at 32–33, 37, *Garrett* (No. 99-1240).

<sup>297</sup> S. REP. NO. 101-116, at 18 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267.

<sup>298</sup> Janet A. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 ARK. L. REV. 261, 322 (1986). Congress was informed of this study at the hearings. STAFF OF THE ON EDUCATION AND LABOR, 101ST CONG., 2 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1641 (Comm. Print 1990). As the title of the study suggests, because the Rehabilitation Act covered only employers who receive federal funds, most state laws covered a larger number of employers, albeit with weaker protections. Contrary to Petitioners’ depiction, Brief for Petitioner at 33–34, *Garrett* (No. 99-1240), “many” of these state laws were enacted after the Rehabilitation Act and were following “the federal government’s lead.” ACIR REPORT, *supra* note 253, at 59.

<sup>299</sup> S. REP. NO. 101-116, at 18 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267.

<sup>300</sup> S. REP. NO. 101-116, at 37; H.R. REP. NO. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303.

<sup>301</sup> See *infra* notes 309–37 and accompanying text.

<sup>302</sup> For example, nearly half the states at the time the ADA was enacted had no reasonable accommodation requirement, and many others had very weak accommodation provisions. Flaccus, *supra* note 298, at 305–08.

discrimination against persons with disabilities come from "the middle management level where most employment decisions are made."<sup>303</sup>

Congress had every reason to believe, as the evidence before it showed, that such state actors, who are not in the public spotlight and do not document their decisional rationales, had not been deterred by (and would not in the future be deterred by) the limited legislation then on the books. Additionally, if the Court is faithful to its first-quartet precedents, "the adequacy of . . . alternative remedies" is a judgment Congress is best situated to make and one to which the courts owe substantial deference.<sup>304</sup> Indeed, this should be especially true of disability law, where the Court has observed that the legislature's superior institutional capacity is at its zenith: "How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps uninformed opinions of the judiciary."<sup>305</sup>

b. *Hurdle Number Two: Congruence and Proportionality*

If the *Garrett* respondents persuade the Court that there was a serious problem of unconstitutional discrimination against persons with disabilities, they will have cleared the first hurdle erected by *City of Boerne* and *Kimel*. That will bring them to the second hurdle: establishing that the ADA's employment provisions are "congruent and proportional" to the constitutional problem. The Court has repeatedly declared, in both the first and second quartets, that Congress, when confronted with a serious problem of invidiously motivated public discrimination, may use its Section 5 power to enact "prophylactic" legislation—banning practices with disparate effects in order to assure that invidiously-motivated practices do not escape detection.<sup>306</sup> It is respondents' contention in *Garrett* that the ADA is such a statute and, further, that the ADA's substantive provisions are carefully tuned to the problem and carefully measured so as not to intrude unnecessarily on the states' legitimate interests as employers.

The ADA's employment provisions take the form of a general ban on discrimination based on disability elaborated by a set of discrete requirements aimed at preventing such discrimination. Here is how the respondents in *Garrett* have argued that each of these provisions, separately and together, are a congruent and proportional response to the problem Congress found.

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<sup>303</sup> ACIR REPORT, *supra* note 253, at 73; *Watson & Trust v. Fort Work Bank*, 487 U.S. 977, 990 (1988) (noting that while top executives may be well intentioned, "[i]t does not follow . . . that the particular supervisors to whom . . . discretion is delegated always act without discriminatory intent"). See also TEXAS REPORT, *supra* note 283.

<sup>304</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1996).

<sup>305</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985).

<sup>306</sup> See cases discussed *supra* notes 131–94 and accompanying text.

i. *Each of the Employment Provisions of the ADA  
Serves an Important Deterrent Function*

(a) *The General Ban on Disability Discrimination*

Section 12112(a) contains a “general rule” that states are not to engage in employment discrimination against a qualified individual with a disability “because of the disability of such individual.”<sup>307</sup> This general rule, in its terms, is addressed to state employment actions that are unconstitutional under such Equal Protection Clause decisions as *Cleburne* and, in its most literal and limited sense, is a rule that “enforces” the guarantees of the Fourteenth Amendment. As the Fourteenth Amendment does not, standing alone, confer a cause of action upon individuals who suffer constitutional violations, as states are not “persons” suable under 42 U.S.C. § 1983,<sup>308</sup> and as Congress had strong evidence of such state employment discrimination, the provision creating that cause of action is the clearest example of proper Section 5 legislation.

(b) *Banning Treatment Based on Stereotypes*

Section 12112(b)(1) declares that “discrimination” within the meaning of the statute includes: “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.”<sup>309</sup> The Senate and House reports make clear that this provision is aimed at the practice of making employment decisions based on disability-based stereotypes. The provision targets both differential treatment based on such stereotypes (such as separate lines of progression, pay scales, or work places for persons with disabilities) and failure to consider persons with disabilities for employment based on stereotypes.<sup>310</sup>

State action based on stereotypes that are totally false or that do not distinguish persons in the disfavored class from the rest of the public are unconstitutional. But § 12112(b)(1) goes a step further by banning *all* disability-based stereotypes, including the kinds that the Court declared in *Kimel* are not unconstitutional (i.e., stereotypes that are truer of persons with disabilities as a class than of others, although not true of each individual in the disfavored class).<sup>311</sup> Even for this latter type of

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<sup>307</sup> 42 U.S.C. § 12112(a) (1994).

<sup>308</sup> *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989).

<sup>309</sup> 42 U.S.C. § 12112(b)(1) (1994).

<sup>310</sup> S. REP. NO. 101-116, at 28–29 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267; H.R. REP. NO. 101-485, pt. 2, at 58, and pt. 3, at 31, 36 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445.

<sup>311</sup> *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631 (2000) (to be published at 528 U.S. 62

stereotype, the requirement of individualized inquiry is an appropriate prophylactic. Congress knew that there was widespread invidious prejudice against persons with disabilities and that stereotypes used by state and local employers often were reflections of (or “covers” for) employment decisions based on prejudice or irrational fear.<sup>312</sup> Against this background, “individualized inquiry” is “essential” if the statute “is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear.”<sup>313</sup> This distinguishes the ADA in a crucial way from the ADEA, given the Court’s conclusion in *Kimel* that older persons are not subjected to invidious discrimination.

(c) *Banning Non-Job-Related Qualification Standards That Have the Effect of Screening out Persons with Disabilities*

Although not invoked in the complaints of either of the respondents in *Garrett*, there are three provisions of the ADA that ban rules and practices that screen out persons with disabilities and that are not job-related and consistent with business necessity. The statute defines “discrimination” to include the use of “standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability.”<sup>314</sup> This requirement is particularized as to “qualification standards, employment tests, or other selection criteria.”<sup>315</sup> These definitions are qualified by §§ 12113(a) and 12112(b)(6), which afford the employer a defense if it can show the use to be “job-related and consistent with business necessity,” and by § 12113(b), which permits the use of qualification standards that disqualify individuals who would “pose a direct threat to the health or safety of other individuals in the workplace.”<sup>316</sup>

It is, of course, a staple of the Supreme Court’s jurisprudence that the Fourteenth Amendment does not ban state action merely because of its disparate impact.<sup>317</sup> But the Court has also recognized that disparate impact can be an indicia of an improperly discriminatory purpose in adopting a facially neutral rule.<sup>318</sup> In consequence, the Court has repeatedly recognized that, when confronting a problem of public

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(2000)).

<sup>312</sup> See, e.g., GREENLEIGH STUDY, *supra* note 284, at 283.

<sup>313</sup> Sch. Bd. v. Arline, 480 U.S. 273, 287 (1987).

<sup>314</sup> 42 U.S.C. § 12112(b)(3)(A) (1994).

<sup>315</sup> §§ 12112(b)(6), (7).

<sup>316</sup> § 12112(b)(6).

<sup>317</sup> Pers. Admin’r v. Feeney, 442 U.S. 256, 273 (1979); Washington v. Davis, 426 U.S. 229, 248 (1976).

<sup>318</sup> Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 489 (1997); *Feeney*, 442 U.S. at 275 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

discrimination fueled by prejudice against an unpopular group, "Congress can prohibit laws with discriminatory effects in order to prevent . . . discrimination in violation of the Equal Protection Clause."<sup>319</sup>

Congress explained that the purpose of the disparate impact provisions in the ADA is precisely to assure that facial neutrality does not shield invidious discrimination:

The requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears.<sup>320</sup>

Against that background, both the House and Senate reports declare the regulation of practices with disparate effects to be one of three "pivotal" commands that "work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process."<sup>321</sup> Congress's explanation parallels the Supreme Court's explanation of the similar provision in Title VII of the Civil Rights Act of 1964.<sup>322</sup>

Of course, not every practice with disparate impact on persons with disabilities will be the product of conscious or subconscious prejudice. Congress so recognized, and through §§ 12112(b)(6) and 12113(a) and (b), exempted from the ADA's ban those rules and practices with disparate impact that are least likely to rest on disability prejudice: those where the employer has strong justification for using the criterion—business necessity or concern for safety.<sup>323</sup>

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<sup>319</sup> *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (citing *City of Rome v. United States*, 446 U.S. 156, 177 (1980)).

<sup>320</sup> S. REP. NO. 101-116, at 37 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267.

<sup>321</sup> S. REP. NO. 101-116, at 37; H.R. REP. NO. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303.

<sup>322</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (stating that disparate-impact analysis safeguards against decisions motivated by discriminatory intent, and "even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain") (emphasis added).

<sup>323</sup> 42 U.S.C. §§ 12112-13 (1994). Moreover, only those claimants who can prove that they are "qualified" for the job they are seeking are eligible to assert a claim under the ADA, so that decisions based correctly on lack of credentials (another common ground for rejection that is unlikely to be unconstitutional) are insulated from challenge.

To be sure, even with these limits, the possibility exists that these disparate-impact provisions will ban some facially neutral practices that in fact are not motivated by prejudice. But, Congress was not required to choose a standard that risked being underprotective of constitutional rights. Congress, faced with sufficient evidence of a serious risk of unconstitutional behavior, may ban facially neutral state practices outright, without allowing the state or local government *any* opportunity to defend those laws as serving a nondiscriminatory purpose, even though the practices would not violate the Constitution unless poorly motivated. Indeed, in each of the first-quartet cases, the Court upheld a statute of just that type.<sup>324</sup> *A fortiori*, Congress is entitled to allow a defense that is not so broad that prejudicial conduct can be smuggled under its cover.

The statutes invalidated in *City of Boerne* and *Kimel* did not represent appropriate exercises of this power because the Court found that the evidence before Congress did not suggest any significant likelihood that there would be substantial amounts of governmental discrimination based on religion or age, and without a likelihood of such discrimination, there was no warrant for adopting a prophylactic approach to prevent such discrimination.<sup>325</sup> Without such a likelihood, the substitution of an effects test would invalidate constitutional behavior disproportionately to any limited prophylactic purpose it would serve. But in the ADA, Congress concluded that the danger of continuing unconstitutional discrimination was very great, both because of the volume of recent discriminatory actions and the pervasiveness of the societal prejudices that were likely to animate such discrimination.<sup>326</sup>

#### (d) *Requiring Reasonable Accommodation*

Section 12112(b)(5)(A) defines “discrimination” to include: “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose

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<sup>324</sup> See generally *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding a nationwide ban on changes in electoral schemes with discriminatory effects, regardless of whether the state was invidiously motivated in adopting the changes); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests for voting regardless of motive); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding congressional ban on English-language eligibility requirement for voting, irrespective of whether the requirement was adopted with a bad motive); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding congressional ban on literacy tests for voting, although such tests violate Fifteenth Amendment only if invidiously motivated).

<sup>325</sup> *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 649–50 (2000) (to be published at 528 U.S. 62 (2000)); *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

<sup>326</sup> 42 U.S.C. § 12101 (1994); see also S. REP. NO. 101-116, at 8–9 (1989), reprinted in 1990 U.S.C.C.A.N. 167.

an undue hardship on the operation of the business of such covered entity.”<sup>327</sup> Reasonable accommodation is available only to applicants or employees who are otherwise qualified for the job. Even as to qualified applicants or employees, it is not a violation to refuse an accommodation that would cause an undue hardship to the employer. “Undue hardship” is defined in the statute as “requiring significant difficulty or expense, when considered in light of” the “nature and cost of the accommodation,” the financial impact on the employer, and the nature of the employer’s operation.<sup>328</sup>

Many persons with disabilities who are fully competent to perform a job need some adjustment of the physical environment because of their disability. It is an easy matter for a supervisor or personnel officer who in fact is animated by disability prejudice, and not by concern about the often minor cost of providing the accommodation,<sup>329</sup> to conceal his true motivation by invoking the cost of the accommodation as a “neutral” justification for denying employment opportunities to persons with disabilities. As EEOC Commissioner Evan Kemp testified at a congressional hearing on the ADA, if employers “want[ ] disabled people, the accommodations really don’t become a burden. If they don’t, they always do.”<sup>330</sup> The ACIR reported to Congress that “sometimes the only real impediment [to accommodation] is the perception of the supervisor. . . . [A]rguments about accommodation costs are used as a smokescreen to mask the real reasons for not hiring a person with a mental or physical disability.”<sup>331</sup>

For these reasons, Congress concluded that the reasonable accommodation provision of the ADA is, along with the disparate impact provision, one of the “pivotal provisions” necessary “to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities.”<sup>332</sup> Congress had ample justification for this conclusion. The Supreme Court, in *Cleburne*, observed that “a civilized and decent society *expects*” its government to accommodate the differences of persons with disabilities.<sup>333</sup> Given the pervasiveness of prejudice

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<sup>327</sup> § 12112(b)(5)(A).

<sup>328</sup> § 12111(10).

<sup>329</sup> Congress found that “many typical accommodations’ can be provided for under \$50,” although, of course, some required accommodations would be more expensive. S. REP. NO. 101-116, at 10. *See also supra* notes 276–79; ACIR Report, *supra* note 253, at 73 (“Studies show[ ] that most workplace accommodations involve little cost.”) The accommodations sought in *Garrett* by Respondent Ash reflect this, *see text at supra* note 35.

<sup>330</sup> H.R. REP. NO 101-485, pt. 2, at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 (quoting STAFF OF THE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1552 (Comm. Print 1990)).

<sup>331</sup> ACIR REPORT, *supra* note 253, at 75.

<sup>332</sup> S. REP. NO. 101-116, at 37 (1989), *reprinted in* 1990 U.S.C.C.A.N. 167.

<sup>333</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 444 (1985) (emphasis

against persons with disabilities, when a state actor fails to do what a civilized and decent society expects and cites costs that do not constitute an undue hardship to the state as the ground for rejecting the applicant who would otherwise be most qualified,<sup>334</sup> there is every reason to suspect that prejudice, and not cost, underlies the refusal.

Congress was also persuaded that the reasonable accommodation provision was necessary to assure that false stereotypes about disability not result in false assumptions of what it would cost to accommodate a person with disability and thus in resultant unwillingness to accommodate. "Stereotypes about disability can result in stereotypes about the need for accommodations, which may exceed what is actually required."<sup>335</sup>

Here, then, as in the case of disparate impact, Congress proceeded reasonably in concluding that discriminatory intent cannot be "adequately policed through disparate treatment analysis," and even if it could, "the problem of subconscious stereotypes and prejudices would remain."<sup>336</sup> Furthermore, in acting on that understanding, Congress proceeded in a proportionate manner, limiting the scope of the reasonable accommodation provision so that it did not invalidate state action in those contexts where it was likeliest to be motivated by legitimate interests. Thus, an employer: (1) need not even consider a candidate who is not qualified, (2) need not select a qualified candidate with a disability even if with reasonable accommodation he or she would not be the best candidate, (3) need not incur undue hardship, and (4) need not act in any way that would pose a direct threat to the health or safety of others.<sup>337</sup>

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added).

<sup>334</sup> The reasonable accommodation provision does not oblige the employer to select a candidate with a disability, but only to evaluate his or her candidacy without taking into account the need to provide the reasonable accommodation. The candidate will be entitled to the job only if, with the need for accommodation removed from the calculus, he or she emerges as the best candidate.

<sup>335</sup> H.R. REP. NO. 101-485, pt. 3, at 39 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445.

<sup>336</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

<sup>337</sup> There are four other substantive employment provisions in the ADA, whose role in preventing discrimination are discussed in this footnote. The Act bans pre-employment inquiries of job applicants as to whether they have disabilities and medical examinations prior to an offer of employment, which may be conditioned on satisfying a medical examination. 42 U.S.C. § 12112(d) (1994). Congress explained that these practices were "often used to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease, and cancer—before their ability to perform the job was even evaluated." S. REP. NO. 101-116, at 39 (1989), *reprinted in* 1990 U.S.C.C.A.N. 167. Banning them, until the employer is otherwise prepared to offer a job, "is critical to assure that bias does not enter the selection process." *Id.*

Section 12112(b)(2) forbids an employer to participate in a contractual or other arrangement with referral agencies, labor unions, and others, when such arrangements result in discriminatory selection or treatment of the employer's workforce. Section 12112(b)(4) forbids an employer to



## ii. *Nationwide Scope of ADA Is Congruent and Proportional*

In *Oregon v. Mitchell*,<sup>338</sup> eight Justices concluded that it is within Congress's Section 5 power to enact nationwide prophylactic provisions when the evidence before Congress suggests that a problem is widespread, even though Congress lacks specific evidence that every state has or is likely to engage in unconstitutional behavior.<sup>339</sup> The prevalence of disability prejudice that Congress found knows no geographic bounds, and Congress had evidence of discriminatory actions animated by that prejudice throughout the nation.<sup>340</sup> Congress concluded from that evidence that there is a nationwide virus of prejudice: "our society is still infected by the . . . assumption that people with disabilities are less than fully human."<sup>341</sup> It was more than reasonable for Congress to conclude that the prophylactics in the ADA should have nationwide application.

While the Court disapproved the nationwide scope of the statutes in *City of Boerne* and *Kimel*, in each of those cases the Court found that there was little if any evidence that *any* state had or was likely to violate the Constitution.<sup>342</sup> In that setting, it is understandable that the Court found a nationwide ban incongruent. That is not the setting of the ADA.

## iii. *The Absence of a Sunset Provision Is Not Fatal to Congruence or Proportionality*

In *City of Boerne* and *Kimel*, the Court cited the absence of a sunset provision—a time limit on the obligations imposed on the states—as a factor relevant to the Court's conclusion that the statutes lacked congruence and proportionality.<sup>343</sup> Petitioners in

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discriminate against an individual "because of the known disability" of another with whom the individual "is known to have a relationship or association." These provisions are aimed at deterring unconstitutional conduct in the same manner as those discussed in the text.

Finally, § 12203 forbids discrimination against an individual for opposing a practice made unlawful by the ADA or for seeking a legal remedy for such violations. The provision is obviously appropriate to assure that the central goals of the ADA are not eroded by employer coercion. Indeed, it may well be that if a state retaliates against an employee who seeks legal remedy from the federal government, the state would be violating the constitutional right to petition the federal government and/or the individual's privileges and immunities of federal citizenship. See *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235 (1967) (noting but not deciding the issue).

<sup>338</sup> 400 U.S. 112 (1970).

<sup>339</sup> *Id.* at 147 (Douglas, J., concurring); *id.* at 216 (Harlan, J., concurring); *id.* at 236 (Brennan, J., concurring); *id.* at 283–84 (Stewart, J., concurring).

<sup>340</sup> See *supra* notes 276–303 and accompanying text.

<sup>341</sup> S. REP. NO. 101-116, at 8–9 (1989), reprinted in 1990 U.S.C.C.A.N. 267.

<sup>342</sup> See *supra* notes 118 & 137.

<sup>343</sup> *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 644–45 (2000) (to be published at 528 U.S.

*Garrett* argue that the ADA fails the congruence and proportionality test because it does not contain an automatic sunset provision. While that is a relevant factor to consider in evaluating congruence and proportionality, *City of Boerne* recognized that it is not a *sine qua non* to Congress's valid exercise of its Section 5 power.<sup>344</sup>

In the case of the ADA, the persistence and prevalence of governmental discrimination against persons with disability and the unlikelihood that it would dissipate overnight made selection of an automatic cut-off infeasible. The states have permanent institutions in Washington to represent their interests in Congress and assuredly have no difficulty getting Congress's attention. If the day comes that the states think the ADA's ban on employment discrimination is no longer needed, they can be expected to invite consideration of its repeal. But that day has not yet arrived, as is evidenced by the decision of forty-two states not to support Alabama's quest in *Garrett*.<sup>345</sup>

#### IV. IF GARRETT FALLS, WHAT REMAINS OF CONGRESS'S EFFORTS TO PROTECT PERSONS WITH DISABILITIES FROM STATE BEHAVIOR?

Let us assume that despite the arguments described in Part III, the Supreme Court rules in *Garrett* that the ADA is not a proper exercise of Congress's Section 5 powers, and thus that the Eleventh Amendment precludes Congress's authorization of private suits against states to enforce the employment provisions of the ADA. That holding will not erase the states' obligations to obey the ADA, as those obligations were imposed pursuant to Congress's Commerce Clause power.<sup>346</sup> How, then, can those obligations be enforced? That is the focus of this Part IV.

##### A. *Suits by Individuals against States as Entities*

A victory for the states in *Garrett* would not necessarily mean that individuals cannot enforce their rights in private actions that name the state as a defendant. At least three alternate routes to the same end must be considered.

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62 (2000)); *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

<sup>344</sup> *Kimel*, 120 S. Ct. at 644-45; *City of Boerne*, 521 U.S. at 533.

<sup>345</sup> See *supra* note 18.

<sup>346</sup> This was acknowledged in the Reply Brief for Petitioners at 1-2, *Garrett* (No. 99-1240). See also *Erickson v. Bd. of Governors of State Colls. & Univs. for N.E. Ill. Univ.*, 207 F.3d 945, 945-50 (7th Cir. 2000) (holding that the ADA is not a proper exercise of Congress's Section 5 power, but acknowledging that Congress had "ample power under the Commerce Clause" to enact the employment provisions of the ADA). As described *supra* at notes 195 & 200 and accompanying text, the commercial character of employment brings it outside the constraints on the Commerce Clause power articulated in *Lopez* and *Morrison*.

### 1. *State Waivers of Eleventh Amendment Immunity*

The Supreme Court has consistently held that states may waive the immunity from suit in federal court that the Eleventh Amendment otherwise confers.<sup>347</sup> Many states have indicated that they support Congress's decision to authorize private suits against states to enforce the ADA.<sup>348</sup> It is predictable that a defeat for the respondents in *Garrett* would prompt agitation for friendly states to waive their immunity and consent to private suits in federal court to enforce the ADA. That surely could be accomplished by the enactment of state legislation. But even without such legislation, the Court has held that, if consistent with his or her powers under state law, a state's attorney general can waive the state's Eleventh Amendment immunity.<sup>349</sup>

### 2. *Suits in State Court to Enforce the ADA*

The Supreme Court held in *Alden v. Maine*<sup>350</sup> that the federal Constitution does not oblige states to entertain in their own courts private suits that are barred from federal courts by the Eleventh Amendment.<sup>351</sup> But nothing precludes state courts from holding that, by reason of waivers of sovereign immunity in the past, the internal law of their state provides state court jurisdiction over such suits.<sup>352</sup> Indeed, Judge Easterbrook in *Erickson* suggested that as Illinois has consented to be sued in its courts, the ADA can be enforced against it by private suit in state court.<sup>353</sup>

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<sup>347</sup> *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2199, 2204–11 (1999) (to be published at 527 U.S. 666 (1999)) (describing cases and emphasizing that the intent to waive must be “unequivocally expressed”).

<sup>348</sup> See *supra* note 6 and accompanying text (showing that the states all supported passage of ADA); *supra* note 18 (explaining that fourteen states joined an amicus curiae brief supporting respondents in *Garrett* and twenty-eight more declined to join an amicus curiae brief supporting petitioners).

<sup>349</sup> *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

<sup>350</sup> 119 S. Ct. 2240 (1999) (to be published at 527 U.S. 706 (1999)).

<sup>351</sup> *Id.* at 712.

<sup>352</sup> If state law declares that a state agency may “sue or be sued, in any court of competent jurisdiction,” the Supreme Court will construe that as a waiver of sovereign immunity in state courts, but not a consent to suit in federal court. *Coll. Sav. Bank*, 527 U.S. at 676. The latter requires “express[ ] consent[ ] to being sued in federal court.” *Id.*

<sup>353</sup> *Erickson v. Bd. of Governors of State Colls. & Univs. for N.E. Ill. Univ.*, 207 F.3d 945, 952 (7th Cir. 2000).

### 3. Suits to Enforce Section 504 of the Rehabilitation Act

The ADA's employment provisions applicable to states were patterned after, and closely resemble, the provisions of section 504 of the Rehabilitation Act.<sup>354</sup> The only difference is that the ADA is an across-the-board statute applicable to all states and state agencies, while section 504 applies only to state programs that accept federal monies. Section 504, as amended, requires that an entity accepting federal funds expressly waive its Eleventh Amendment immunity to private suits in federal court to enforce section 504. If the ADA is not properly grounded in the Fourteenth Amendment, it is a fair conclusion that neither is section 504. But, that is not the end of the inquiry respecting section 504, for the statute is independently grounded in Congress's spending power.<sup>355</sup> The Court has repeatedly held that Congress may extract concessions from states as a condition to receipt of federal money that it could not directly impose on nonconsenting states.<sup>356</sup> The concession becomes in effect a contractual obligation—the consideration for the federal monies that the federal government would not provide absent that consideration.<sup>357</sup>

To be sure, the Court has hinted that there may be limits to Congress's ability to extract concessions as the price for receiving federal monies. In the leading case, *South Dakota v. Dole*, the Court stated that "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"<sup>358</sup> The decisions to date, however, have been quite generous in finding the requisite connection. In *Dole*, authored by Justice Rehnquist, the Court held that Congress could condition the states' receipt of federal funds for highway construction upon the state raising the drinking age to twenty-one. The connection—that raising the drinking age to twenty-one would reduce highway accidents—was deemed sufficient.<sup>359</sup> At a minimum, this would seem to support, *a fortiori*, waivers of

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<sup>354</sup> 29 U.S.C. § 794 (1994).

<sup>355</sup> *Jim C. v. United States*, 235 F.3d 1079, 1080 (8th Cir. 2000) (en banc) (holding "that Section 504 is a valid exercise of Congress's spending power").

<sup>356</sup> The leading case is *South Dakota v. Dole*, 483 U.S. 203 (1987), described *infra* text accompanying note 358–59. See also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 31 (1981); *Maher v. Roe*, 432 U.S. 464, 480 (1977); *New York v. United States*, 505 U.S. 144, 145 (1992).

<sup>357</sup> See generally *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

<sup>358</sup> 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

<sup>359</sup> See *Dole*, 483 U.S. at 208–09.

Eleventh Amendment immunity as to suits to enforce section 504 that are made as a condition to receipt of federal monies that assist the state in treating, employing, or otherwise providing services to persons with disabilities.<sup>360</sup>

There is always the danger, of course, that the Court, as part of its present agenda to get the federal government off the backs of the states, might shrink Congress's power to extract concessions in exchange for the provision of federal monies. But assuming that the Court does not retreat from its spending power jurisprudence, section 504 will remain enforceable by private suit in federal court.<sup>361</sup>

## B. *Suits by Individuals against State Officials*

### 1. *The Doctrine of Ex parte Young*

In a 1908 case, *Ex parte Young*,<sup>362</sup> the Supreme Court held that even though states were not suable because of the Eleventh Amendment, individual state actors could be sued and injunctions sought to prevent the violation of federal constitutional or statutory rights.<sup>363</sup> Although initially predicated on an *ultra vires* rationale—the individual state official had no authorization from the state to violate the federal norm, and thus should be individually accountable for his misconduct—that rationale quickly dropped away, and the doctrine was applied regularly (especially during the school desegregation era) to cases in which the individual actor plainly was implementing the state's perceived interests. The doctrine thus evolved into a patent “fiction,” a device to secure injunctive relief against state action despite the Eleventh Amendment.

The early cases, including *Ex parte Young* itself, involved injunctions of a negative type: the actor was enjoined not to use his power to violate federal

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<sup>360</sup> See *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc) (upholding section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (1994), under Congress's spending power).

<sup>361</sup> In *Garrett*, the plaintiffs' complaints alleged violations of section 504 as well as the ADA. See *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214, 1215 (2000). The Eleventh Circuit upheld section 504 as proper Fourteenth Amendment legislation, and exempt from the Eleventh Amendment for that reason. *Id.* at 1218–19. The state agencies challenged that ruling in their petition for certiorari. See Petition for Certiorari at i, *Garrett* (No. 99-1240). Respondents countered that, whether or not section 504 is properly grounded in the Fourteenth Amendment, the agencies had consented to suit in federal court coincident to taking federal funds related to treatment of disability. Memorandum of Respondents [in Response to Petition for Writ of Certiorari] at 8–15, *Garrett* (No. 99-1240). The Supreme Court granted certiorari only with respect to the ADA and not with respect to the state agencies' challenge to section 504. *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214, 1215 (2000), *cert. granted*, 68 U.S.L.W. 3654 (U.S. Apr. 17, 2000) (No. 99-1240).

<sup>362</sup> 209 U.S. 123 (1908).

<sup>363</sup> *Id.* at 167.

constitutional or statutory rights. Since compliance required nothing more than the individual choice of the defendant, it was possible to envision the "fiction" as resting on the idea that the suit was against the actor as an individual, not in his official capacity. But by the time of the desegregation efforts of the 1960s (if not earlier), the Court quite explicitly held that affirmative injunctions could be issued against state actors—indeed, injunctions that required them to dip into the state treasury to finance the relief that was ordered by the injunction. Plainly, the notion that the suit was merely against the actor in his nonofficial capacity was no longer sustainable—only in his official capacity could the state actor gain access to the state treasury. The fiction thus became even more fanciful: this suit was not against the state, even though the injunction issued required action that only the state (acting through its official who was the defendant) could take.

In *Edelman v. Jordan*, an effort was made by a state to secure a reversal of this doctrine, but the effort failed.<sup>364</sup> In an opinion by Justice Rehnquist, the Court acknowledged the incongruity of banning suits against states but enabling relief from the states via orders addressed to state actors, but declared this to be history's compromise, from which the Court would not retreat.<sup>365</sup> Injunctive relief could be obtained by suits against state officials, including relief that required the prospective dipping into the state treasury. But, *Edelman* held, the Eleventh Amendment stood as a bulwark against securing damage awards or other retrospective monetary relief against these officials that would be payable from the state treasury.<sup>366</sup> Of course, damages could be awarded against the offending state official to be paid from his own pocket. But that is a decidedly inferior option: the individual may be judgment proof, and in any event enjoys at least a qualified immunity that will make damages unavailable in a wide swathe of cases.<sup>367</sup>

The positive side of the *Edelman* compromise—the availability of injunctive relief that requires prospective monetary relief from the state treasury—was carried yet a step further in *Hutto v. Finney*.<sup>368</sup> The court there held that a plaintiff who succeeds in an *Ex parte Young* suit can secure an award of attorneys fees that will be

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<sup>364</sup> 415 U.S. 651 (1974).

<sup>365</sup> *Id.* at 669–70.

<sup>366</sup> *Id.* at 678.

<sup>367</sup> The leading Supreme Court decision is *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See also *Ruffino v. Sheahan*, 218 F.3d 697, 700 (7th Cir. 2000) (explaining current doctrine); *Vazquez*, *supra* note 48, at 876–77:

Under current doctrine, an officer is immune from damage liability if the federal law he is alleged to have violated was not 'clearly established' at the time of the alleged violation. As the Court currently applies that standard, the officer is immune from damage liability unless the law was clear at a fact-specific level. . . . Certainly, it leaves many violations of federal law unremedied.

<sup>368</sup> 437 U.S. 678 (1978).

enforced against the state treasury.<sup>369</sup> To date, the Court has not retreated from the *Edelman* compromise. So long as that compromise holds, Congress has power to authorize suits against state officials seeking injunctive relief (and attorneys fees), even to enforce statutes that are grounded solely on the Commerce Clause.

However, this does not automatically mean that such suits can be brought to enforce the ADA against individual state actors. Congress has the *power* to authorize suits against public officials for injunctive relief and attorneys fees,<sup>370</sup> but has Congress *exercised* that power with respect to the ADA? There are two possible sources for such an exercise: the ADA and § 1983. They will be examined seriatim.

a. *The ADA*

The ADA forbids discrimination by any “covered entity” defined as “an employer, employment agency, labor organization, or joint labor-management committee.”<sup>371</sup> “Employer” is defined as “a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person.”<sup>372</sup> While the italicized words suggest that an agent of an employer is separately obligated to obey the ADA, the case law is weighted heavily against that interpretation.

The same definitions appear in Title VII of the Civil Rights Act of 1964 and in the ADEA. The Courts have generally construed the italicized language to have been added merely to assure that employers will have respondeat superior liability for the acts of their agents, and not to create a cause of action against the individual agent. The cases are collected and described in *EEOC v. AIC Security Investigations, Ltd.*<sup>373</sup>

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<sup>369</sup> *Id.* at 700.

<sup>370</sup> *Alden v. Maine*, 119 S. Ct. 2240, 2263 (1999) (to be published at 527 U.S. 706 (1999)) (declaring that “certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land”); *Hutto v. Finney*, 437 U.S. 678, 693–700 (1978) (holding that the Eleventh Amendment does not prevent the award of attorney’s fees against state corrections officers under the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988 (1994)); *Gen. Oil Co. v. Crain*, 209 U.S. 211 (1908) (holding that suits against state actors may be necessary to protect against state laws that violate constitutional rights).

<sup>371</sup> 42 U.S.C. §§ 12112(a), 12111(2) (1994).

<sup>372</sup> § 12111(5)(A).

<sup>373</sup> 55 F.3d 1276, 1280–81 (7th Cir. 1995). *See also generally* *Coddington v. Adelphi Univ.*, 45 F. Supp.2d 211 (E.D.N.Y. 1999); *Sifre v. Dep’t of Health*, 38 F. Supp.2d 91 (D.P.R. 1999); *Cooke-Seals v. District of Columbia*, 973 F. Supp. 184 (D.D.C. 1997); *Cleveland v. KFC Nat’l Mgmt. Co.*, 948 F. Supp. 62 (N.D. Ga. 1996). *Contra* *Icampo v. Hasbro, Inc.*, 929 F. Supp. 562 (D.R.I. 1996).

b. *Section 1983*

If the ADA itself does not authorize suits against individuals, does § 1983 provide an alternative basis for suing the officials? Section 1983 provides for suits against public officials for deprivations of rights under federal law and the ADA is such a law. But, alas, *Seminole Tribe* furnishes troublesome precedent here.<sup>374</sup> After holding that the Eleventh Amendment barred the suit against the state, the Court went on to hold that *Ex parte Young* could not be used to secure relief from a state official.<sup>375</sup> The statute contemplated suit only against the state, and prescribed a “carefully crafted and intricate remedial scheme.”<sup>376</sup> A suit under *Ex parte Young* would expose the state official to remedies far exceeding those prescribed in the statute.<sup>377</sup> Congress having prescribed the lesser, the Court was unwilling to assume that it intended the greater:

Here . . . we have found that Congress does not have authority under the Constitution to make the State suable in federal court . . . . Nevertheless, the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter . . . . Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [the suit against the state] was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts.<sup>378</sup>

The ADA’s enforcement scheme is in some respects more limited than that available under § 1983. Damages are capped under Title I of the ADA, but not under § 1983. Moreover, if the weight of authority is correct that state officials are not suable as “employers” under the ADA, Congress in the ADA chose not to expose individuals to monetary liability at all. For these reasons, it is doubtful that the Court would tolerate § 1983 actions seeking damages for ADA violations. (Of course, Congress would be free to amend the ADA to achieve this result.)

On the other hand, suits against state officials seeking injunctive relief that would have been available against the state, but for the Eleventh Amendment problem, would have some chance of surviving even without an amendment to the ADA. In those suits, the only remedies the plaintiff would recover are remedies the ADA plainly contemplated.

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<sup>374</sup> *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>375</sup> *Id.* at 53.

<sup>376</sup> *Id.* at 73–74.

<sup>377</sup> *Id.* at 74–75.

<sup>378</sup> *Id.* at 75–76.



### C. *Suits by the Federal Government against States*

Another incongruity of the Court's compromise respecting federalism is the consistent holding that the Eleventh Amendment does not apply to suits brought by the federal government.<sup>379</sup> Under existing law, the provisions of the ADA empowering the Department of Justice (DOJ) to sue states for violations of the ADA would survive a ruling in *Garrett* that the ADA violates the Eleventh Amendment.

The only tricky question is whether the DOJ would be entitled to seek damages against the state of the type that is not available under the *Edelman* compromise. The answer would seem to be "yes," judging from decisions under Title VII.<sup>380</sup>

If the Court holds in *Garrett* that individuals cannot sue states, but adheres to its consistent position that the federal government *can* sue states, we arrive at the ultimate preposterousness of the current quest to resurrect federalism. To achieve full enforcement of the ADA (and of the ADEA and other statutes that are axed by the *Kimel* doctrine), Congress would have to greatly enlarge the federal executive branch to enable it to bring all the suits that would otherwise have been brought by individuals. A doctrine that leads to massive expansion of the federal government and vastly increased occasions in which the federal government is suing states in federal courts and securing compulsive relief against states, hardly comports with the "equal sovereign" picture that fuels the Court's current agenda. The Court would have outlawed limited skirmishes, while authorizing nuclear war. Viewed as a matter of principle, the quest is demonstrably quixotic.

But if one views the Court's motivation as pragmatic, rather than driven by principle, the picture changes. It is unlikely that Congress would authorize the enormous sums necessary to finance this nuclear war. Indeed, even if a particularly sympathetic Congress did so, it is unlikely that that momentum would be sustained year after year, as each succeeding budget is considered. The Court's Eleventh Amendment doctrine thus deprives Congress of the ability to decide, once and for all, to authorize across-the-board litigation against states who violate the ADA and to rely on private attorneys general to enforce the statute. Rather, Congress would have to

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<sup>379</sup> *West Virginia v. United States*, 479 U.S. 305, 311 (1987) (finding that "States have no sovereign immunity as against the Federal Government"); *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (citation omitted):

[N]othing in this or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States. The United States in the past has in many cases been allowed to file suits in this and other courts against States . . . with or without specific authorization from Congress.

See also *Vazquez*, *supra* note 48, at 859-60 (stating that suits by the federal government against state officials are left open by the Eleventh Amendment).

<sup>380</sup> *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (showing the Department of Justice pursuing relief for individuals victimized by a pattern and practice of discrimination); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971) (same).

decide each year to commit enormous federal resources in order to secure enforcement. That is a sure prescription for reducing the volume of suits that states will have to defend, at least over time.

The requirement of federal enforcement will achieve that reduction in volume in yet another way: it will insert a federal enforcement agency as a screener of which suits have merit. The federal government will have to determine that the suit has merit before it is brought, and some unmeritorious suits that might have been brought by individuals will not be filed by the federal government. Of course, if Congress thought this screening device was a sensible idea, it could have inserted it into the ADA, as it has in some other federal statutes.<sup>381</sup> The Eleventh Amendment enables the Court, rather than Congress, to make this policy choice, and to make it in favor of a screening function that will lower the volume of cases the federal courts must entertain.

#### V. CONCLUSION: WILL THE MISCHIEF THAT *KIMEL* REPRESENTS ENDURE?

*Kimel* is a fait-accompli. A piece of the ADEA has been stricken. *Garrett* and the ADA may be next (and then, perhaps, the FMLA, disparate impact under Title VII, Title VIII of the Fair Housing Act, and so forth). Has the Court imposed an enduring limit on Congress's ability to bring states to heel? Two considerations cast doubt.

First, this line of decisions flows entirely from *Seminole Tribe*, a 5–4 decision, that reversed the *Union Gas* holding that Congress has the power to authorize individual suits against states to enforce legislation enacted under Congress's Article I powers.<sup>382</sup> Four current Justices have repeatedly signaled that they will reverse *Seminole Tribe* at the first opportunity, if they secure a like-minded fifth vote.<sup>383</sup> It is not inevitable that *Seminole Tribe* will survive President Bush's appointments. Adherence to *Seminole Tribe*'s interpretation of the Eleventh Amendment is unlikely to be a litmus test for choosing Supreme Court Justices, as *Seminole Tribe* has no constituency (except for five Justices presently on the Court). Certainly the states are not a constituency, as they have shown themselves quite content to be covered by the laws the Court is striking down. Republican judicial appointees would not predictably all share the mindset of the current five on this particular issue—witness the

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<sup>381</sup> Under the National Labor Relations Act, employees must file charges with the National Labor Relations Board's General Counsel, who alone may issue a complaint against the party charged. 29 U.S.C. §§ 153(d), 160 (1994). Similarly, employees who believe their employer has retaliated against them for pursuing enforcement of the Occupational Safety and Health Act must file their complaints with the Secretary of Labor, who alone may initiate litigation against the employer. 29 U.S.C. § 660(c)(2) (1994).

<sup>382</sup> *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>383</sup> See *supra* note 77 and accompanying text.

Republican legislators who supported enactment of the bills authorizing individual suits against states, and the prominent Republican leaders (including Senators Hatch and Dole, and former President Bush) who have joined amicus curiae briefs opposing the states' quest to be shielded from such suits.<sup>384</sup>

Second, even without reversal of *Seminole Tribe*, Congress has the power to do much to secure enforcement of these statutes. It can use its spending power to secure waivers of the Eleventh Amendment to the maximum extent consistent with the Court's spending power rulings. It can authorize suits against state officials for enforcement of all such statutes, thus ensuring the availability of *Ex parte Young*. It can overcome one of the problems with traditional *Ex parte Young* lawsuits—the qualified immunity enjoyed by state officials—by expressly declaring that the officials will not enjoy a qualified immunity (or, at least, narrowing the scope of the immunity so that it is less protective than that under existing Supreme Court law).<sup>385</sup> Additionally, Congress can appropriate more monies to enable federal enforcement agencies to bring at least some of the lawsuits that otherwise would have been brought by individuals.

Time will tell whether Congress has the will to wage the continuing battle with the Supreme Court in these areas. The Supreme Court enjoys an institutional advantage in these battles, as its small size enables it to act cohesively. But, Congress has shown that, when poked in the eye enough, it can harness its sprawling body to overturn Supreme Court mischief.<sup>386</sup>

#### POSTSCRIPT: THE SUPREME COURT'S DECISION IN *GARRETT*

Just days before this article was to go to press, the Supreme Court issued its decision in *Garrett*, holding, by the now-familiar 5–4 vote, that Title I of the ADA violates the Eleventh Amendment insofar as it authorizes private suits against states.<sup>387</sup> The majority opinion, authored by Chief Justice Rehnquist, concluded that

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<sup>384</sup> See *supra* notes 4, 5 and accompanying text at page 4.

<sup>385</sup> The qualified immunity the Court has read into § 1983 is based on Congress's presumed intent, not any constitutional foundation. See *generally supra* note 48.

<sup>386</sup> See, for example, the Civil Rights Act of 1991, 42 U.S.C. § 2000e (1994) (overturning several Supreme Court interpretations of Title VII, including those contrary to the intent of § 20003-12).

<sup>387</sup> *Univ. of Ala. Bd. of Trs. v. Garrett*, No. 99-1240, 2001 U.S. LEXIS 1700 (U.S. Feb. 21, 2000). The Court refrained from addressing the constitutionality of the comparable provision in Title II of the ADA, instead dismissing as improvidently granted the portion of the writ of certiorari that embraced that issue. *Garrett*, 2001 U.S. LEXIS 1700, at \*8, n.1. The Court assigned, as the reason for this action, the unsettled question whether employment is covered by Title II—an issue on which the circuits are in conflict, see *supra* note 12 and accompanying text, but which was not among the issues on which the state agencies had sought certiorari in *Garrett*. 2001 U.S. LEXIS 1700, at \*8, n.1. It is also possible, of course, that one or more of the five Justices in the majority

Title I of the ADA is not a proper exercise of Congress's Fourteenth Amendment power. The majority found two defects: (1) Congress did not compile a record sufficient to demonstrate that there was a pattern of *unconstitutional* state employment discrimination against persons with disabilities,<sup>388</sup> and, (2) even if it had, the adoption of disparate impact and reasonable accommodation provisions would not be appropriate responses to such discrimination.<sup>389</sup>

The majority opinion resolves the doubt, expressed in the body of this article,<sup>390</sup> whether the current Court has retreated from the principles announced in the "first quartet" (i.e., the voting rights decisions from 1966–1980) defining Congress's Fourteenth Amendment powers. The current Court unquestionably has retreated, most notably in its failure to accord the deference to Congress that was the hallmark of those decisions, and in its application of "heightened scrutiny" to Congress's findings and remedies. As Justice Breyer lamented in his opinion for the four dissenters, "it is difficult to understand why the Court, which applies 'minimum 'rational-basis' review' to statutes that *burden* persons with disabilities . . . subjects to far stricter scrutiny a statute that seeks to *help* those same individuals."<sup>391</sup>

That retreat is evident in both of the Court's holdings. With respect to the first—the inadequacy of the record to support Congress's finding of a pattern of unconstitutional behavior by the states—the majority's approach was aptly characterized by Justice Breyer, speaking for the four dissenters: the majority "review[ed] the congressional record as if it were an administrative agency record."<sup>392</sup> Congress was not permitted to infer, from the fact of rampant societal discrimination—findings that the majority acknowledged were amply supported in the congressional record<sup>393</sup>—that state actors were not immune from this prevalent virus.<sup>394</sup> Neither was Congress entitled to infer, from widespread behavior by states disadvantaging persons with disabilities, that state actors had not been motivated by rational concerns in visiting that disadvantage.<sup>395</sup> This is a far cry from the deference to congressional fact-finding reflected in the first quartet.

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doubted that the same fate (a decree of unconstitutionality) should be visited on Title II.

<sup>388</sup> *Id.*, at \*22–28.

<sup>389</sup> *Id.*, at \*28–33.

<sup>390</sup> See *supra* note 147 and accompanying text.

<sup>391</sup> *Garrett*, 2001 U.S. LEXIS 1700, at \*57 (emphases in original).

<sup>392</sup> *Id.*, at \*37 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.).

<sup>393</sup> *Id.*, at \*23–24.

<sup>394</sup> *Id.*, at \*24–25.

<sup>395</sup> *Id.*, at \*29–30. This holding was buttressed by an unprecedented narrow interpretation of the Equal Protection Clause. The majority opinion appears to hold that the Clause is not violated when a state actor takes action disadvantaging persons with disabilities that is motivated solely by "negative attitudes" or irrational "fear," so long as the state, when later challenged in court, can proffer a rational basis upon which that action *could have been* motivated. *Id.*, at \*4. The majority appears to believe that pretextual behavior offends the Constitution only when based on a

With respect to the second holding—that even were there a pattern of state discrimination against persons with disabilities that violated the Constitution, the ADA’s remedies would not be congruent and proportional—the Court majority showed no deference whatever to Congress’s discretion in formulating remedies. As reasonable accommodation and avoidance of disparate impact are not themselves constitutionally required, Congress cannot adopt them in response to a pattern of unconstitutional behavior.<sup>396</sup> The utility of these remedies as prophylactics against invidiously-motivated state action was not even discussed, let alone refuted, in the majority opinion.

The only consolation for the disability community in the Court’s opinion are the declarations of what the holding does *not* undo. “[T]he Eleventh Amendment does not extend its immunity to units of local government. . . . [and so] [t]hese entities are subject to private claims for damages under the ADA.”<sup>397</sup> And, with respect to the states themselves, “Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*. . . .”<sup>398</sup>

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classification that merits heightened scrutiny.

<sup>396</sup> *Id.*, at \*6.

<sup>397</sup> *Id.*, at \*23.

<sup>398</sup> *Id.*, at \*33 n.9 (construing *Ex Parte Young*, 209 U.S. 123 (1908)).

